Volume 9, No. 13, Pages 2688 to 3012, June 13 - June 24, 1994

C 1.12/3:9/13

SOCIOLOGY & ECONOMICS
DETROIT PUBLIC LIBRARY

FCC Record

A comprehensive compilation of decisions, reports, public notices and other documents of the Federal Communications Commission of the United States.

FEDERAL COMMUNICATIONS COMMISSION

Reed E. Hundt, Chairman
James H. Quello
Andrew C. Barrett
*Susan Ness
**Rachelle B. Chong

The contents of this document are subject to correction by means of an erratum appearing at a future date in the FCC Record. Users should notify the Secretary of errors so that an erratum can be inserted in a later publication.

The appropriate citation for documents printed in the FCC Record should include the volume number, page number, and year. See 47 C.F.R. Section 1.14. Earlier Commission documents may continue to be cited to the FCC Reports.

Citation Form: 9 FCC Rcd 1 (1994)

*Commissioner Ness June 3, 1994.
**Commissioner Chong June 6, 1994.

DETROIT PUBLIC LIBRARY
AUG 0 9 1994
DEPOSITORY DOCUMENT

United States Government Printing Office * Washington, D.C.
For Sale by the Superintendent of Documents U.S. Government Printing Offices on a subscription basis

Federal Communications Commission Record

Volume 9
Issue 13

Table of Contents

Table of Cases..... i

Table of FCC and Delegated Authority Numbers..... iii

Table of Docket Numbers..... iv

Table of Rulemakings..... v

Table of Localities..... vi

Table by Subject Matter..... vii

Table by Statutory and Rule Provisions..... ix

Decisions, Reports, Memorandum Opinions, Orders, and Other Selected Material..... 2688

Table of Cases
Volume 9
Issue 13

Case Name	Page
ACI Micro	2716
AT&T Corp.	2697
Amendment of Part 2 - Radio Frequency Devices	2702
Amendment of Part 97 - HF Digital Communications	2850
Amendment of Parts 61, 64, and 69 - Expanded Interconnection	2718
American Telephone and Telegraph Company	2688
American Telephone and Telegraph Company	2782
American Telephone and Telegraph Company	2783
American Telephone and Telegraph Company	2785
American Telephone and Telegraph Company	2829
American Telephone and Telegraph Company	2830
Anderson, Gary H.	2712
Answer Iowa, Inc.	2784
BTMI, Inc.	2856
Beehive Telephone, Inc.	2751
COMSAT Corporation	2787
Cable TV Act of 1992 - Video Programming	2896
Capitol City Broadcasting Company	2802
Central Missouri State University	2749
Central Missouri State University	2750
Citizens Utilities Company	2747
Collett, Randal R.	2819
Communication Telesystems International	2789
Dianne Feinstein, John Seymour, and Thomas Hayes	2698
Dorch, Rebecca L. (CORRECTED)	2753
Eads Broadcasting Corporation	2859
Esaw Industries, Inc.	2693
Fee Decisions of the Managing Director	2934
Gunari, Jeff	2691
Ian, Inc.	2826
Implementation of Section 309(j) of the Communications Act	2941
Implementation of Sections 3(n) and 332 of the Communications Act	2863
Jim Darnell, William Johnson and Bobby Cronan	2809
KQED, Inc.	2813
Keystone Communications Corporation	2797
LEC's Rates, Terms, and Conditions	2808
LEC's Rates, Terms, and Conditions	2742
LEC's Rates, Terms, and Conditions	2838
MCI Telecommunications Corporation (ERRATUM)	2777
Maritime Radio Station WAP8267	2715
McClure, Mary	2692
McDonald, Michael	2695

Case Name	Page
Multimedia Entertainment, Inc.	2811
NorLight, Inc.	2740
Pacific Bell	2752
Pine Tree Media, Inc.	2770
Price Cap Performance Review for Local Exchange Carriers	2748
Rainbow Broadcasting Company	2839
Reexamination of Policy on Comparative Broadcast Hearings	2821
Seabreeze Parasail	2717
Senator John F. Kelly	2815
Sencon Incorporated	2853
Sprint Communications Company L.P.	2824
Sprint Communications Company L.P.	2827
Susan Jacobs Designs, Inc.	2854
T-One Communications Corp.	2775
TN Technologies Division of Thermo Instrument Controls, Inc.	2713
TV Food Network	2779
Table of Allotments, FM, Cambridge and St. Michaels, MD	2767
Table of Allotments, FM, Alexander City, AL and West Point, GA	2823
Table of Allotments, FM, Chester, VA	2766
Table of Allotments, FM, Galatia, IL	2760
Table of Allotments, FM, Mamou and Jonesville, LA	2764
Table of Allotments, FM, Woodville, MS and Clayton, LA	2769
Table of Allotments, TV, Kailua, HI	2758
Table of Allotments, TV, Waimanalo, HI	2762
Telephone and Data Systems, Inc.	2780
The Pacifica Foundation	2817
The Titan Corporation	2798
Voyager Networks, Inc.	2738
West Coast Telecommunications, Inc.	2696

Table of Cases by Delegated Authority and FCC Number

Volume 9
Issue 13

Delegated Authority or FCC Number	Page
DA 94 - 510	2753
DA 94 - 550	2749
DA 94 - 551	2750
DA 94 - 556	2742
DA 94 - 567	2691
DA 94 - 568	2692
DA 94 - 569	2693
DA 94 - 570	2695
DA 94 - 571	2712
DA 94 - 572	2713
DA 94 - 573	2717
DA 94 - 574	2715
DA 94 - 575	2716
DA 94 - 576	2738
DA 94 - 577	2740
DA 94 - 578	2751
DA 94 - 581	2688
DA 94 - 583	2760
DA 94 - 584	2758
DA 94 - 585	2762
DA 94 - 587	2752
DA 94 - 591	2764
DA 94 - 593	2697
DA 94 - 594	2696
DA 94 - 595	2766
DA 94 - 596	2779
DA 94 - 597	2747
DA 94 - 601	2748
DA 94 - 603	2767
DA 94 - 604	2769
DA 94 - 605	2787
DA 94 - 606	2782
DA 94 - 607	2783
DA 94 - 608	2784
DA 94 - 609	2785
DA 94 - 610	2823
DA 94 - 614	2798
DA 94 - 615	2775
DA 94 - 616	2797
DA 94 - 617	2789
DA 94 - 622	2777
DA 94 - 625	2808
DA 94 - 626	2838
DA 94 - 630	2809
DA 94 - 631	2811
DA 94 - 632	2813
DA 94 - 633	2824
DA 94 - 634	2830
DA 94 - 635	2826
DA 94 - 636	2827
DA 94 - 637	2829
DA 94 - 638	2815
DA 94 - 639	2817
DA 94 - 643	2819
DA 94 - 647	2853
DA 94 - 652	2934
FCC 94 - 90	2698
FCC 94 - 98	2941
FCC 94 - 100	2863
FCC 94 - 110	2702
FCC 94 - 118	2718
FCC 94 - 119	2896
FCC 94 - 122	2839
FCC 94 - 127	2856
FCC 94 - 129	2859
FCC 94 - 167	2821
FCC 94 - 171	2850
FCC 94 - 172	2854
FCC 94D - 5	2802
FCC 94R - 8	2770
FCC 94R - 9	2780

Table of Cases by Docket Number
Volume 9
Issue 13

Docket Number				Page
CC	Dkt.No.90	-	623	2752
CC	Dkt.No.91	-	141	2718
CC	Dkt.No.93	-	129	2751
CC	Dkt.No.93	-	162	2742
CC	Dkt.No.93	-	162	2808
CC	Dkt.No.93	-	162	2838
CC	Dkt.No.94	-	1	2748
CC	Dkt.No.94	-	11	2780
CS	Dkt.No.94	-	48	2896
ET	Dkt.No.94	-	45	2702
GC	Dkt.No.92	-	52	2821
GN	Dkt.No.93	-	252	2863
MM	Dkt.No.90	-	352	2802
MM	Dkt.No.92	-	291	2767
MM	Dkt.No.93	-	265	2770
MM	Dkt.No.93	-	284	2769
MM	Dkt.No.93	-	294	2823
MM	Dkt.No.93	-	310	2766
MM	Dkt.No.94	-	50	2760
MM	Dkt.No.94	-	51	2764
MM	Dkt.No.94	-	52	2762
MM	Dkt.No.94	-	53	2758
PP	Dkt.No.93	-	253	2941
PR	Dkt.No.94	-	519	2850

Table of Cases by Rulemaking Number
Volume 9
Issue 13

Rulemaking Number	Page
RM - 7739	2821
RM - 7740	2821
RM - 7741	2821
RM - 8125	2702
RM - 8133	2767
RM - 8218	2850
RM - 8280	2850
RM - 8342	2823
RM - 8375	2769
RM - 8395	2766
RM - 8458	2760
RM - 8466	2764
RM - 8473	2762
RM - 8475	2758

Table of Cases by City
Volume 9
Issue 13

City/ State	Page
Alexander City, AL	2823
Bellaire, OH	2856
Brownsville, OR	2859
Cambridge, MD	2767
Chester, VA	2766
Chignik Lagoon, AK	2712
Clayton, LA	2769
Colorado Springs, CO	2716
Detroit, MI	2815
East Brunswick, NJ	2693
Galatia, IL	2760
Honolulu, HI	2717
Jonesville, LA	2764
Kailua, HI	2758
Kenner, LA	2715
Kingston, WA	2692
Lexington, KY	2819
Longview, TX	2770
Longview, TX	2802
Los Angeles, CA	2698
Malden, MO	2809
Mamou, LA	2764
Orlando, FL	2839
Redding, CA	2691
San Francisco, CA	2813
Santa Fe, NM	2713
Sioux City, IA	2784
St. Michaels, MD	2767
Waimanalo, HI	2762
Washington, DC	2779
Washington, DC	2753
West Palm Beach, FL	2854
West Point, GA	2823
Woodinville, WA	2695
Woodville, MS	2769

Subject	Page
Adjudication	
Review Board or Commission Decision	
Misrepresentation and lack of candor	2802
Broadcast Radio Services - General Rules	
Applications	
Facilities, applications to modify/change control of unbuilt	2839
Construction permits	
Extension/replacement, application for	2839
Licenses and permits	
Multiple ownership of broadcast stations in the same	2856, 2859
Program contents	
Political editorials	2809
Broadcasting - FM Stations	
Allotments and assignments	
Allotments, table of	2764, 2766, 2760, 2769 2767, 2823
Broadcasting - TV Stations	
Allocations/assignments/licenses	
Table of assignments	2762, 2758
Cable Television Service	
Markets and services	
Cable signals in major markets, provisions for	2749
Carriers: Service Altered	
Discontinuance/reduction/impairment	
Public coast station, applications to close/reduce service at	2784
Extensions and supplements	
Applications, contents of	2782, 2783, 2798, 2797 2789
Commission Organization	
Common Carrier Bureau	
Functions: recommend/administer policies for services for hire	2941
Delegations of authority - Chief, Common Carrier Bureau	
Limitations on delegated authority	2697, 2696, 2742, 2748 2808, 2853
Mass Media Bureau	
Functions: recommend/administer policy re radio/television	2718

Subject	Page
Common Carriers: Miscellaneous Rules	
Enhanced services (computer) and customer-premises equipment	2752
Communications Act of 1934	
Common Carriers	
Contracts shall be filed, copies of	2785
Extension of lines, certificate for 2787, 2783, 2784, 2797,	2798, 2789
Radio, provisions for	
Candidates for public office, facilities for 2698, 2811,	2813
Radio, provisions relating to	
Applications;form of and conditions attached to licenses	2821
License for radio communication or trans 2691, 2692, 2695,	2712, 2717
Frequency Allocations and Radio Treaty Matters	
Equipment authorization procedures: application procedures	
Forms prescribed by commission, applications on	2702
Identification of equipment	2702
Marketing of radiofrequency devices	
Devices not approved, limitations on radiofrequency 2693,	2713
Practice and Procedure	
Common carriers: complaints	
Formal or informal	2777
Common carriers: services and facilities reports	
Reduction in experimental service, cross reference to	2716
Ex parte presentations, general information	
Definitions	2839
Hearing proceedings: participants and issues	
Intervene, petitions to 2770,	2780
Hearing proceedings: presiding officer's rulings	
Final ruling, appeal from	2770
Interlocutory ruling, appeal from	2770
Reconsideration/review of Commission action	
Actions by delegated authority, effective dates of	2698
Reconsideration of a final FCC action, pet. 2691, 2692, 2693, 2712, 2715, 2716,	2695, 2717
Private Land Mobile Radio Services	
Licensing/use of frequencies in 806-821, 851-866 MHz bands	
Frequencies, selection and assignment and table of	2854

TABLE OF STATUTORY AND RULE PROVISIONS

	Page
000.130 Functions of the Office	2839
000.291 Delegated Authority	2696
000.291 Delegated Authority	2697
000.291 Delegated Authority	2742
000.291 Delegated Authority	2747
000.291 Delegated Authority	2748
000.291 Delegated Authority	2808
000.291 Delegated Authority	2838
001.102(b)(3), Eff. dates of actions by delegated authority	2698
001.106 Petition for Reconsideration	2692
001.106 Petition for Reconsideration	2693
001.106 Petition for Reconsideration	2695
001.106 Petition for Reconsideration	2712
001.106 Petition for Reconsideration	2715
001.106 Petition for Reconsideration	2716
001.106 Petition for Reconsideration	2717
001.106 Petitions for reconsideration	2839
001.115 Application for Review, Denied	2856
001.1202 Definitions	2839
001.1204 General Exemptions	2839
001.1208 Restricted proceedings	2839
001.1212 Procedures for handling of prohibited ex parte	2839
001.223 Petitions to Intervene	2770
001.223(a) Intervention As a Matter of Right	2780
001.301 Appeal	2770
001.302 Appeal	2770
001.711 formal or informal complaints	2777
001.80 Forfeiture Proceedings	2713
001.890 Notice of violations	2715
002.803 Equipment requiring Commission approval	2693
002.803 Equipment requiring Commission Approval	2713
002.803 Equipment requiring Commission approval	2716
002.803 Marketing of radio frequency devices prior to	2702
002.909 Responsible party	2702
002.913 Submittal of equipment authorization application	2702
002.924 Marketing of electrically identical equipment	2702
002.925 Identification of equipment	2702
043.510 Contracts and Concessions	2785
063.001 Contents of Application	2738
063.001 Contents of Application	2740
063.001 Contents of Application	2782
063.001 Contents of Application	2783
063.001 Contents of Application	2824
063.001 Contents of Application	2826
063.001 Contents of Application	2827
063.001 Contents of Application	2829
063.001 Contents of Application	2830
063.01 Contents of Application	2775
063.010 Contents of Application	2797
063.010 Contents of Application	2798

063.010 Contents of Applications 2789
063.690 Contents of Applications to Close or Reduce Hours of 2784
064.1001 International Settlements Policy 2785
064.1501 Definitions 2819
064.1504 Restrictions on the use of 800 numbers 2819
073.1930 Political Editorials 2809
073.202 FM Table of Allotments 2760
073.202 FM Table of Allotments 2766
073.202 FM Table of Allotments 2767
073.202 FM Table of Allotments 2769
073.202 FM Table of Allotments 2823
073.3534 Application for extension of construction permit 2839
073.3535 Application to modify authorized but unbuilt facili 2839
073.3555 Multiple ownership 2859
073.3555(a)(3)(iii) Radio Contour Overlap Rule 2856
073.3584 Procedure for filing petitions to deny 2859
073.4104 Financial qualifications, TV stations 2839
073.606 TV Table of Allotments 2758
073.606 TV Table of Allotments 2762
076.610(b) COMPLAINTS REGARDING QUALIFIED NCE STATIONS 2749
076.610(b) COMPLAINTS REGARDING QUALIFIED NCE STATIONS 2750
090.621(b) Selection and assignment of frequencies 2854
097.109 Station control 2850
097.221 Automatically controlled digital station 2850
001.106 Petition for Reconsideration 2691
300.211 Copies of Contracts to be filed 2785
300.214 Extension o 2783
300.214 Extension of Lines 2738
300.214 Extension of Lines 2740
300.214 Extension of Lines 2775
300.214 Extension of Lines 2782
300.214 Extension of Lines 2784
300.214 Extension of Lines 2787
300.214 Extension of Lines 2789
300.214 Extension of Lines 2797
300.214 Extension of Lines 2798
300.214 Extension of Lines 2824
300.214 Extension of Lines 2826
300.214 Extension of Lines 2827
300.214 Extension of Lines 2829
300.214 Extension of Lines 2830
300.301 License for Radio Communication or transmission of 2692
300.301 License for radio communication or transmission of 2695
300.301 License for radio communication or transmission of 2712
300.301 License for radio communication or transmission of 2717
300.301 License for radio communications or transmission of 2691
300.301 License for radio communications, or transmission of 2715
300.302 Devices which interfere with radio reception 2693
300.302 Devices which interfere with radio reception 2713
300.302 Devices which interfere with radio reception 2716
300.309 Action Upon Applications; Form and Conditions Attach 2821
300.315 Facilities for Candidates for Public Office 2811
300.315 Facilities for Candidates for Public Office 2813
300.315 Facilities for Candidates for Public Office 2815

300.315 Facilities for Candidates for Public Office 2817
300.315(b) 2698
300.533 Ownership restrictions 2896
300.535 CARRIAGE OF NONCOMMERCIAL EDUCATIONAL TELEVISION 2749
300.535 CARRIAGE OF NONCOMMERCIAL EDUCATIONAL TELEVISION 2750
300.548 Development of competition and diversity 2896
400.201 Implementation of Policy 2787
400.401 Applicability of Communications Act of 1934 2787
47 C.F.R. 000.291 Delegated authority 2853
47 C.F.R. 043.510, Contracts and concessions; 47 U.S.C. §§ 2688
47 CFR 064.702 2752
47 U.S.C. 000.154 (i) Authority to Act on Dismissal of Actio 2853
500.2095 Character Qualifications: False Financial Certifica 2802
500.2125 Misrepresentation and lack of candor 2802
500.2170 Financial Qualifications 2802
500.503 Forfeitures in cases of rebates and offsets 2691
500.503 Forfeitures in cases of rebates and offsets 2692
500.503 Forfeitures in cases of rebates and offsets 2693
500.503 Forfeitures in cases of rebates and offsets 2695
500.503 Forfeitures in cases of rebates and offsets 2712
500.503 Forfeitures in cases of rebates and offsets 2713
500.503 Forfeitures in cases of rebates and offsets 2716
500.503 Forfeitures in cases of rebates and offsets 2717
Gary Anderson, Order, DA 94-571 2712
Part 2 Frequency Allocations and Radio Treaty 2702
Part 61, 64 & 69 2718

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN TELEPHONE & TELEGRAPH COMPANY
Complainant,

v. File No. E-92-88

MCI TELECOMMUNICATIONS CORPORATION
Defendant.

MEMORANDUM OPINION AND ORDER

Adopted: May 31, 1994; Released: June 13, 1994

By the Acting Chief, Common Carrier Bureau:

I. INTRODUCTION

1. American Telephone and Telegraph Company (AT&T) filed the above-captioned formal complaint[1] on May 8, 1992 against MCI Telecommunications Corporation (MCI) alleging that MCI unlawfully provided service pursuant to a non-uniform accounting rate between the United States (U.S.) and the United Arab Emirates (UAE) in violation of the Commission's International Settlements Policy (ISP), Section 43.51 of the Commission's rules, 47 C.F.R. § 43.51, and, consequently, Section 201 of the Communications Act of 1934, as amended, 47 U.S.C. § 201 (Act).[2] AT&T claims that as a result of MCI's conduct, it was whipsawed,[3] by the UAE and denied the right to establish its own service in the UAE.[4] AT&T seeks monetary damages to compensate for the revenue it lost due to its exclusion from the UAE's telecommunications market. For the reasons discussed below, we grant AT&T's complaint.

II. BACKGROUND

2. The ISP requires that U.S. international carriers provide service to foreign points on terms identical to those of other U.S. carriers that provide similar service to the same point. Agreements governing compensation and the routing of traffic for originating and terminating international messages must be uniform in all material terms. Absent a waiver of this policy, it is unlawful for a U.S. carrier to agree to any more or less favorable terms than any other U.S. carrier. In this way, the ability of the foreign correspondent to whipsaw U.S. carriers is strictly limited.[5]

3. AT&T alleges that on May 1, 1990, MCI violated the ISP by agreeing to and implementing a non-uniform accounting rate with the UAE. This rate incorporated two elements. First, MCI agreed to the standard international long distance (ILD) rate of $2.00 per minute, which is applied to actual minutes of use (MOU). Second, MCI consented to incorporate a provision negotiated between it and the UAE that required MCI to include in its MOU calculations all call set-up time in excess of 30 seconds.[6]

4. At the time of MCI's alleged violation, the ISP required that whenever a carrier implements a non-uniform term in an operating agreement, the carrier must give at least 21 days concurrent notice to the Commission and any other carrier that provides similar service to that point.[7] AT&T alleges that MCI's 30 second call set-up provision created a non-uniform accounting rate and that MCI consequently violated the Commission's policies and rules by failing to notify AT&T and the Commission prior to implementing that rate.

III. CONTENTIONS OF THE PARTIES

5. AT&T contends that the provision requiring call set-up time to be included in the calculation of the MOU created an unlawful, non-uniform accounting rate. To support this claim, AT&T contends that the Bureau denied AT&T permission to implement an identical accounting rate.[8]

6. According to AT&T, MCI was required to notify the Commission and AT&T that it had entered into an operating agreement containing a non-uniform accounting rate at least 21 days prior to the agreement's effective date. AT&T

---

[1] AT&T originally filed an informal complaint on November 13, 1991, but withdrew it in order to file this formal complaint.

[2] Complaint at 1-2.

[3] "Whipsawing" is a term of art referring to the practice of a foreign correspondent, usually a state-sponsored or state-owned monopoly telephone company, playing competitive U.S. carriers against one another in order to gain concessions and benefits for itself to the detriment of U.S. carriers and ratepayers, a result at odds with the U.S. public interest. Implementation and Scope of the Uniform Settlements Policy for Parallel International Communications Routes, Report and Order, CC Docket No. 85-204, 59 RR 2d 982, 985 (1986) (*ISP Order*). In this instance, the foreign correspondent is Emirates Telecommunications Corporation Ltd. (Etisalat), the UAE's state-owned, monopoly telephone company. Complaint at 1-2.

[4] The services at issue are MCI's CALL USA and AT&T's USADirect. These services allow persons abroad to dial a toll-free number to reach an MCI or AT&T operator in the U.S., who then completes the call to the desired number in the U.S.

[5] For a more complete discussion of the ISP, *see* Uniform Settlement Rates on Parallel International Communications Routes, Memorandum Opinion and Order, 84 FCC 2d 121 (1980); *ISP Order*, 59 RR 2d at 982; and Implementation and Scope of the Uniform Settlements Policy for Parallel International Communications Routes, Order on Reconsideration, 2 FCC Rcd 1118 (1987) (*ISP Recon. Order*).

[6] "Call set-up time" refers to the amount of time it takes for a call to be connected at both ends.

[7] *ISP Recon. Order*, 2 FCC Rcd at 1122-23. The ISP now provides for more detailed and varied procedures depending on the type of change sought. *See* Regulation of International Accounting Rates, Phase 1, Report and Order, 6 FCC Rcd 3552 (1991); 47 C.F.R. §§ 43.51(d), 64.1001 (1992). An "operating agreement" governs how service is provided. It contains the technical details of interconnection as well as the terms for the settlement of accounts between a U.S. carrier and a foreign correspondent. *ISP Order*, 59 RR 2d at 985.

[8] AT&T Brief at 4-5; *See* American Telephone and Telegraph Company Petition for Waiver, 7 FCC Rcd 2186 (Com. Car. Bur. 1992) (*AT&T Waiver Order*). In that Order, the Bureau denied AT&T's petition for waiver of the ISP which sought permission for AT&T to implement an accounting rate with the UAE that was identical to the rate that MCI accepted.

argues that MCI's failure to make such notification enabled the UAE to whipsaw AT&T. Specifically, AT&T contends that for ten months it was denied permission to provide its USADirect service to the UAE unless it agreed, as had MCI, to include all call set-up time in excess of 30 seconds in its MOU calculations.[9] AT&T concludes, therefore, that because MCI did not comply with the notification requirement of the ISP, MCI's implementation of the rate was not only unlawful, but caused AT&T competitive injury.

7. MCI contends that AT&T's reliance on the Bureau's *AT&T Waiver Order* as evidence that MCI's rate was unlawful is misplaced because the Bureau did not reach the merits of the proposed settlements arrangement. Rather, AT&T argued in its waiver request that, even though AT&T wanted to provide USADirect service to the UAE, "the public interest is best served by a Commission decision which *rejects* the imposition of premium accounting rate payments, such as that produced by the inclusion of call set-up time in [MOU calculations]."[10] MCI argues, therefore, that the *AT&T Waiver Order* provides no support for the assertion that the subject arrangement is unlawful.[11] Alternatively, MCI argues that even if the *AT&T Waiver Order* amounted to a holding that the 30-second provision in the operating agreement is unlawful, such a finding was subsequent to MCI's agreement with the UAE, and, therefore, MCI cannot be held liable for violating a rule which did not exist at the time its agreement was implemented.[12]

8. In addition, MCI argues that the notification requirement of the ISP was not triggered because it did not expect any calls to require more than 30 seconds to set up.[13] MCI avers that no calls, in fact, required more than 30 seconds to set up. Thus, MCI contends that because it never included call set-up time in its MOU calculations, no violation of the ISP occurred.

9. MCI also argues that the 30-second provision applied to service provided on a trial basis and, as such, a 21-day notice was not required.[14] AT&T responds that the ISP applies to all services; it does not establish a different standard for a service provided on a trial basis. AT&T further adds that the tariff revisions filed by MCI to include the UAE as one of the countries eligible for CALL USA service did not indicate that the service was to be for a trial period or in any other way differentiate the CALL USA service to the UAE from CALL USA service to other eligible countries.[15]

IV. DISCUSSION

10. The chief issue in this complaint is whether the operating agreement between MCI and the UAE contained a non-uniform term. If so, MCI had a duty to notify the Commission and AT&T of its intention to modify the terms under which service was to be provided.[16] For the reasons set forth below, we find that the operating agreement between MCI and the UAE contained a non-uniform term, and that MCI violated the ISP by failing to provide the required notice to the Commission and AT&T.

11. MCI has presented no evidence or arguments to establish that, at the time MCI entered into the agreement with the UAE, any other operating agreement between a U.S. carrier and the UAE to provide similar foreign service contained a provision that included in the MOU calculations all call set-up time in excess of 30 seconds. Thus, the 30-second provision was a non-uniform term and MCI had an affirmative duty to provide the 21-day notice required by the ISP.

12. We are unpersuaded by MCI's contention that it was not required to notify the Commission because it did not expect the 30 second call set-up provision to ever apply. The focus of the ISP and the Commission's 21-day review period is the actual terms of an agreement between a U.S. international carrier and a foreign correspondent,[17] not, as MCI contends, whether a particular term is expected to result in a non-uniform practice.

13. We further disagree with MCI's contention that "no Commission rule exists which requires the filing of an arrangement agreeing to pay for call set-up time on a trial basis."[18] At the time of MCI's agreement, the ISP required a 21-day notice prior to implementation of a non-uniform accounting rate, regardless of the duration of the underlying service. There is simply nothing in the ISP to suggest that the anticipated duration of service affects this requirement. As MCI is well aware, the Bureau has previously rejected the notion that accounting rates agreed to on an "experimental" or "transitory" basis are not subject to the ISP.[19] The ISP does not distinguish between services provided on a trial and those offered on a permanent basis.

14. MCI's inclusion of the 30-second term in the agreement between MCI and the UAE created an opportunity for the UAE to whipsaw other U.S. carriers. Indeed, it appears that AT&T was whipsawed because it was denied permission to provide USADirect service unless it agreed to an identical 30- second call set-up term. It was MCI's failure to comply with the ISP's notification requirement that allowed the UAE to force AT&T to choose either to agree to the MCI-UAE accounting rate or to forego im-

---

[9] AT&T Brief at 7.

[10] *AT&T Waiver Order*, 7 FCC Rcd at 2186 (quoting AT&T Petition for Waiver and adding emphasis).

[11] It is instructive, however, that upon learning of the Bureau's denial of AT&T's waiver request, MCI notified the UAE that MCI would discontinue providing CALL USA service if the 30-second provision remained in effect. The UAE subsequently waived the 30-second provision for MCI and allowed AT&T to begin providing its USADirect service without the 30-second provision. MCI Brief at 4.

[12] MCI Brief at 6-7 and MCI Reply Brief at 1-4.

[13] *See supra*, para. 3.

[14] MCI Brief at 2-3 and MCI Reply Brief at 3.

[15] AT&T Reply Brief at 5.

[16] MCI contends that there has been no adverse ruling on the merits of the 30-second term. Regardless of the merits of MCI's contention, that is not the issue here. Rather, the issue is whether MCI violated the ISP by failing to notify the Commission and other U.S. international carriers providing service to the UAE that it had agreed to a non-uniform settlements term, regardless of whether the Commission would have approved the term on the merits had it been given the opportunity. We reiterate that the purpose of the 21-day notice period is to provide an opportunity for affected carriers to comment on, and for the Commission to review, the merits of proposed non-uniform terms.

[17] *See, e.g., ISP Order*, 59 RR 2d at 985-86, 1003.

[18] MCI Reply Brief at 3.

[19] *See* American Telephone and Telegraph Company and MCI Communications Corporation Petitions for Waiver, Memorandum Opinion and Order, 5 FCC Rcd 4618, 4619 (Com. Car. Bur. 1990)).

plementing its USADirect service. This is a classic case of whipsawing. The whipsawing occurred even though MCI completed call set-ups within 30 seconds and even though it used the standard ILD rate to calculate compensation between it and the UAE. Contrary to MCI's assertions, the record clearly demonstrates that the initiation of AT&T's USADirect service between the UAE and the U.S. was delayed as a direct result of MCI's agreement with the UAE and the UAE's whipsawing of AT&T in direct violation of the ISP. Section 43.51 of the Commission's rules, 47 C.F.R. § 43.51, and Section 201(b) of the Act, 47 U.S.C. § 201(b).

V. CONCLUSION AND ORDERING CLAUSES

15. For the reasons discussed above, the Bureau finds that MCI has violated the Commission's International Settlements Policy, Section 43.51 of the Commission's rules, 47 C.F.R. § 43.51, and, consequently, Section 201(b) of the Act, 47 U.S.C. § 201(b). AT&T may file a supplemental complaint for damages within 60 days after the release of this order. In this supplemental proceeding, the parties will have a full and fair opportunity to build a record on damages.

16. Accordingly, IT IS ORDERED, pursuant to Sections 1, 4(i), 4(j), and 208 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), and 208, and the authority delegated by Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, that the above-captioned complaint filed by AT&T IS GRANTED to the extent indicated herein.

17. IT IS FURTHER ORDERED that AT&T, in accordance with the Commission's rules, *see* 47 C.F.R. § 1.722, may file a supplemental complaint concerning damages within 60 days after the release date of this Order.

FEDERAL COMMUNICATIONS COMMISSION

A. Richard Metzger, Jr.
Acting Chief, Common Carrier Bureau

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

Richard M. Smith
Chief, Field Operations Bureau

In the Matter of

Jeff Gunari NAL Acct. No. 315SF0044
Redding, California

ORDER

Adopted: May 21, 1994; Released: June 13, 1994

By the Chief, Field Operations Bureau:

I. INTRODUCTION

1. Mr. Jeff Gunari requested reconsideration of the monetary forfeiture of $500 issued pursuant to Sections 503(b), 47 U.S.C. §503(b), for violation of Section 301 of the Communications Act of 1934, as amended (the Act), 47 U.S.C. Section 301. For the reasons noted below, we are cancelling the monetary forfeiture.

II. BACKGROUND

2. On April 6, 1993, the Federal Communications Commission's (FCC) San Francisco Office issued a Notice of Apparent Liability (NAL) to Mr. Gunari. The penalty was imposed for operating an Emergency Position Indicating Radio Beacon (EPIRB) on board his vessel. The vessel was not in distress and Mr. Gunari had no FCC authorization for this operation. Based on the response from Mr. Gunari, the FCC's San Francisco Office issued a Notice of Forfeiture (NOF) for $500 on July 22, 1993. Mr. Gunari now appeals. The petitioner contends that the beacon was activated by vandals and that he is unable to pay the penalty.

III. DISCUSSION AND CONCLUSION

3. The arguments raised by Mr. Gunari have been thoroughly considered and are incorporated herein by reference. Upon review of these arguments, as well as review of the NAL and NOF, we find that the petitioner fails to raise any new arguments not previously addressed, and that the violation occurred. However, we note that the financial information submitted supports the petitioner's contention that he is unable to pay a forfeiture. Accordingly, the forfeiture is hereby cancelled. However, the Petitioner's action did constitute a violation of Section 301 of the Act and the violation may be considered in future proceedings for subsequent violations of the Act or rules.

IV. ORDERING CLAUSES

4. IT IS ORDERED THAT, pursuant to Section 503(b) of the Act, 47 U.S.C. § 503(b), and Section 1.106 of the Rules, 47 C.F.R. § 1.106, the petition for reconsideration is GRANTED and the monetary forfeiture is CANCELLED.

5. IT IS FURTHER ORDERED that a copy of this Order shall be sent by certified mail, return receipt requested to Mr. Gunari.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Mary McClure NAL/Acct. No. 215FE0215
Kingston, Washington

ORDER

Adopted: May 24, 1994; Released: June 13, 1994

By the Chief, Field Operations Bureau:

I. INTRODUCTION

1. Mary McClure (Petitioner) filed a Petition for Reconsideration, requesting reconsideration of the monetary forfeiture of $200 issued pursuant to Section 503, 47 U.S.C. § 503, for violation of Section 301 of the Communications Act of 1934, as amended (the Act). For the reasons noted below, the Bureau affirms the monetary forfeiture.

II. BACKGROUND

2. On September 17, 1992, the Commission's Ferndale Office issued a Notice of Apparent Liability (NAL) to Mary McClure. The penalty was imposed for operating on Marine Channel 28 (157.400 MHz), on the marine radio service, with an expired license (WTU7823). Based on Petitioner's response, the Ferndale Office issued a Notice of Forfeiture (NOF) for $200 on November 9, 1992. Petitioner now appeals. Petitioner contends that the forfeiture amount is excessive and should be reduced because Petitioner did not realize that the vessel's station license had expired and has since applied for a new license.

III. DISCUSSION AND CONCLUSION

3. The arguments raised in Petitioner's response letter, which is hereby accepted as a Petition for Reconsideration, have been thoroughly considered and are incorporated herein by reference. Upon review of the arguments raised in the Petition as well as review of the NAL and NOF, we find that the Petitioner fails to present any new arguments or evidence that was not previously addressed. Although Petitioner claims inability to pay the forfeiture, no documentation, such as tax returns or financial statements that were requested in the Notice of Apparent Liability, was submitted to support this claim. Accordingly, the forfeiture amount is affirmed.

IV. ORDERING CLAUSES

4. IT IS ORDERED THAT, pursuant to Section 503(b) of the Act, 47 U.S.C. § 503(b), and Section 1.106 of the Rules, 47 C.F.R. § 1.106, the petition for reconsideration is DENIED.

5. IT IS FURTHER ORDERED pursuant to Section 1.80 of the Rules, 47 C.F.R. § 1.80, that Mary McClure must pay the forfeiture amount of two hundred dollars ($200) within thirty (30) days of receipt of this Order. Payment may be made by check or money order payable to the Federal Communications Commission.[1] Please place NAL/Acct. No. 215FE0215 on the remittance and mail it to:

Federal Communications Commission
Post Office Box 73482
Chicago, Illinois 60673-7482

6. IT IS FURTHER ORDERED that a copy of this Order shall be sent to Mary McClure.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Smith
Chief, Field Operations Bureau

[1] Requests for installment plans should be mailed to: Chief, Billings and Collections, Mail Stop 1110A2, 1919 M Street, N.W., Washington, D.C. 20554. Payment of the forfeiture in installments may be considered as a separate matter in accordance with Section 1.1914 of the Commission's Rules.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Esaw Industries, Inc. NAL/Acct. No. 215CG0059
East Brunswick, NJ

ORDER

Adopted: May 25, 1994; Released: June 13, 1994

By the Chief, Field Operations Bureau:

I. INTRODUCTION

1. Esaw Industries, Inc. (Petitioner) filed a Petition for Reconsideration, requesting reconsideration of the monetary forfeiture of $5,600 issued pursuant to Section 503, 47 U.S.C. § 503, for violation of Section 302(b) of the Communications Act of 1934, as amended (the Act), 47 U.S.C. § 302(b) and Section 2.803 of the Commission's Rules, 47 C.F.R. § 2.803. For the reasons noted below, the Bureau affirms the monetary forfeiture.

II. BACKGROUND

2. On July 16, 1992, the Commission's Chicago Office issued a Notice of Apparent Liability (NAL) to Esaw Industries, Inc. The penalty was imposed for exhibiting an unauthorized FM Stereo Mini-Transmitter/Receiver Model 360-03 at an electronic trade show. Based on the response from Esaw Industries, the Chicago Office issued a Notice of Forfeiture (NOF) for $5,600 on September 24, 1992. Esaw Industries now appeals. The Petitioner contends that the forfeiture should be cancelled or reduced because the violation was minor, accidental (in that one of its employees unknowingly removed the gift-box covering which included the disclaimer notice which must accompany any display of unauthorized devices under Section 2.803), and done in good faith. Petitioner also contends that the company is financially unable to pay the forfeiture.

III. DISCUSSION AND CONCLUSION

3. The arguments raised in paragraphs 12-20 of Petitioner's Brief in support of its Petition for Reconsideration have been thoroughly considered and are incorporated herein by reference. Upon review of the arguments raised in the petition as well as review of the NAL and NOF, we find that the petitioner fails to present any new arguments or evidence which merit a cancellation or a further reduction (the forfeiture amount was previously reduced by 20% based on the fact that Petitioner has no history of prior violation of Commission rules).

4. Although Petitioner argues that a disclaimer was removed accidentally, its assertions do not support that claim. Those arguments indicate, rather, that any removal resulted more from ignorance of the law rather than from an "accident". The wilfull nature of a violation is established by a showing that the actions resulting in the violation were intended; not on a showing that there was any specific intent to violate the law. An accidental violation, therefore, would be one resulting from an unintended action which resulted in the violation.

5. We also reject Petitioner's argument that the forfeiture should be reduced because Petitioner acted in good faith. The facts surrounding this violation do not support Petitioner's argument that it attempted to comply. Unlike the facts in the case cited by Petitioner, *Caching Technology Corp.*, NAL/Acct No. 215PO0011 (June 5, 1992), in the case before us there was no partial or incomplete disclaimer notice. Petitioner is merely asking the Commission to accept its assertion that a disclaimer existed at some point. Caching Technology Corporation , the subject of the violation, did display a sign. The amount of the forfeiture was adjusted downward because the notice provided was in substantial compliance with the disclaimer language set forth in Section 2.803; and, therefore, supported a finding of a good faith attempt to comply. Unlike the circumstances in *Caching*, in the instant case there was no visible disclaimer notice at all.

6. We note that the Petitioner claims that it cannot pay the forfeiture without financial hardship, and submitted financial information in support of this contention. The financial information, however, does not support that contention. We, therefore, affirm the forfeiture order.

IV. ORDERING CLAUSES

7. IT IS ORDERED THAT, pursuant to Section 503(b) of the Act, U.S.C. § 503(b), and Section 1.106 of the Rules, 47 C.F.R. § 1.106, that the Petition for Reconsideration is DENIED.

8. IT IS FURTHER ORDERED pursuant to Section 1.80 of the Rules, 47 C.F.R. § 1.80, that Esaw Industries, Inc. must pay the forfeiture amount of five thousand six-hundred dollars ($5,600) within thirty (30) days of receipt of this Order. Payment may be made by check or money order payable to the Federal Communications Commission.[1] Please place NAL/Acct. No. 215CG0059 on the remittance and mail it to:

Federal Communications Commission
Post Office Box 73482
Chicago, Illinois 60673-7482

9. IT IS FURTHER ORDERED that a copy of this Order shall be sent to Esaw Industries, Inc. and counsel.

[1] Requests for installment plans should be mailed to: Chief, Billings and Collections, Mail Stop 1110A2, 1919 M Street, N.W., Washington, D.C. 20554. Payment of the forfeiture in installments may be considered as a separate matter in accordance with Section 1.1914 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Smith
Chief, Field Operations Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Michael McDonald NAL/Acct. No. 215FE0147
Woodinville, Washington

ORDER

Adopted: May 24, 1994; Released: June 13, 1994

By the Chief, Field Operations Bureau:

I. INTRODUCTION

1. Michael McDonald (Petitioner) filed a Petition for Reconsideration, requesting reconsideration of the monetary forfeiture of $500 issued pursuant to Section 503, 47 U.S.C. § 503, for violation of Section 301 of the Communications Act of 1934, as amended (the Act). For the reasons noted below, the Bureau reduces the monetary forfeiture amount to $100.

II. BACKGROUND

2. On June 24, 1992, the Commission's Ferndale Office issued a Notice of Apparent Liability (NAL) to Michael McDonald. The penalty was imposed for operating on Marine Channel 16 from an unlicensed radio transmitter aboard a vessel which identified as "TOUCHE, WYR3682", with Washington state vessel registration number WN2316LF.[1] Based on the Petitioner's response, the Ferndale Office reduced the amount of the proposed forfeiture from $2,000 to $500, and issued a Notice of Forfeiture (NOF) for this reduced amount on August 26, 1992. Petitioner now appeals. The Petitioner contends that the forfeiture should be cancelled because this was his first violation of Commission Rules; that the violation was unintentional, and that he is unable to pay the forfeiture.

III. DISCUSSION AND CONCLUSIONS

3. The arguments raised in Petitioner's letter, which is hereby accepted as a Petition for Reconsideration, have been thoroughly considered and are incorporated herein by reference. Since the issuance of the Forfeiture Order in the instant case, the Commission has reviewed its forfeiture standards, as set out in the Commission's *Policy Statement, Standards for Assessing Forfeitures*, 8 FCC Rcd 6215 (1993). Accordingly, we are reducing the amount of the forfeiture in marine cases such as this where the violation involved warrants a reduction less than that envisioned in the *Policy Statement*. Thus, the forfeiture amount will be reduced accordingly.

4. Lastly, although the petitioner claims that he is unable to pay the forfeiture, the he failed to submit documentation, such as the financial information requested in the Notice of Apparent Liability, to support that claim. Therefore, no further adjustment for inability to pay is warranted.

IV. ORDERING CLAUSES

5. IT IS ORDERED THAT, pursuant to Section 503(b) of the Act, 47 U.S.C. § 503(b), and Section 1.106 of the Rules, 47 C.F.R. § 1.106, the petition for reconsideration is GRANTED in part and DENIED in all other respects.

6. IT IS FURTHER ORDERED, pursuant to Section 1.80, 47 C.F.R. § 1.80, that Michael McDonald must pay the forfeiture amount of one hundred dollars ($100) within thirty (30) days of receipt of this Order. Payment may be made by check or money order payable to the Federal Communications Commission.[2] Please place NAL/Acct. No. 215FE0147 on the remittance and mail it to:

Federal Communications Commission
Post Office Box 73482
Chicago, Illinois 60673-7482

7. IT IS FURTHER ORDERED that a copy of this Order shall be sent to Michael McDonald.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Smith
Chief, Field Operations Bureau

[1] The record shows that the call sign WYR3682 was issued to Michael O. McDonald, Woodinville, Washington, for use aboard the vessel TOUCHE, with registration number WN196BW. This license expired on October 26, 1986 and was not renewed.

[2] Requests for installment plans should be mailed to: Chief, Billings and Collections, Mail Stop 1110A2, 1919 M Street, N.W., Washington, D.C. 20554. Payment of the forfeiture in installments may be considered as a separate matter in accordance with Section 1.1914 of the Commission's Rules.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: June 6, 1994

COMMISSION APPLIES "PERMIT BUT DISCLOSE" EX PARTE RULES TO FORMAL COMPLAINT FILED BY WEST COAST TELECOMMUNICATIONS, INC. AGAINST NYNEX TELEPHONE COMPANIES, E-94-59

The Commission has before it a tariff proceeding involving a petition to reject or suspend and investigate NYNEX Transmittal No. 292 filed by West Coast Telecommunications, Inc. (West Coast). The tariff proceeding raises issues concerning the lawfulness of the tariff filed by NYNEX to implement its debit card, called the NYNEX Change Card. The debit card allows end users to place local and 1+ sent paid toll calls, including both interLATA and international calls, from specially equipped telephones without depositing coins. For *ex parte* purposes, the tariff proceeding is a non-restricted proceeding under Section 1.1206(b)(6) of the Commission's Rules, 47 C.F.R. § 1.1206(b)(6).

On April 4, 1994, West Coast Telecommunications, Inc. (West Coast) filed a formal complaint, E-94-59, against the NYNEX Telephone Companies (NYNEX) challenging the lawfulness of NYNEX's tariff filing. The tariff proceeding and formal complaint are substantially interrelated because they involve common issues relating to the NYNEX tariff. In both proceedings, West Coast alleges, among other things, that the requirement that an interexchange carrier enter into a billing and collection agreement with NYNEX in order for the carrier to subscribe to the service is an unjust and unreasonable practice in violation of Section 201(a) of the Act and unreasonably restricts access to the debit card to those interexchange carriers which enter into such an agreement with NYNEX in violation of Section 202(a) of the Act. Unlike the pending tariff proceeding, however, the formal complaint proceeding has been restricted as specified in Subsection 1.1208(c)(1)(i)(B) of the Rules, 47 C.F.R. § 1.1208(c)(1)(i)(B).

We believe that the public interest in expeditiously resolving the issues raised by the tariff proceeding would best be served by ensuring that the tariff proceeding and related discussions continue with a minimum of disruption during the pendency of the formal complaint. Because the tariff and complaint proceedings involve common issues, however, we believe that this interest must be balanced against the parties' interest in ensuring that decisions on the common issues are based upon a record available to all interested parties. In balancing these interests, the Bureau finds that the public interest would be served by making applicable to the formal complaint proceeding the "permit but disclose" *ex parte* rules applicable to nonrestricted proceedings, pursuant to Section 1.1200(a) of the Commission's Rules, 47 C.F.R. §1.1200(a).[1] These rules permit interested parties to make *ex parte* presentations to Commission decisionmakers but require that these presentations be disclosed in the record of the relevant proceeding. Written *ex parte* communications must be filed with the Secretary while oral *ex parte* communications must be summarized in writing and also filed with the Secretary (with a copy to the person or persons with whom the communication was made). All *ex parte* filings should reference the appropriate file number or numbers.[2]

Consistent with this Public Notice, all parties making *ex parte* presentations on the NYNEX Transmittal No. 292 proceeding shall file any written *ex parte* presentations and summaries of any oral *ex parte* presentations in both the tariff proceeding and the formal complaint proceeding, File No. E-94-59.

Copies of the West Coast complaint and any subsequently filed documents in both of these proceedings, including *ex parte* materials, may be obtained from International Transcription Services, Inc., Suite 140, 2100 M Street, N.W., Washington, DC 20037, (202) 837-3800 or at 1250 23rd Street, N.W., Plaza Level, Washington, D.C.

For further information, contact Anne Linton at (202) 632-4887 regarding the formal complaint or Suzan Friedman at (202) 632-6917 regarding NYNEX Transmittal No. 292.

By the Acting Chief, Tariff Division and the Acting Chief, Enforcement Division

FEDERAL COMMUNICATIONS COMMISSION

[1] Section 1.1200(a) permits the Commission to adopt modified or more stringent ex parte procedures in particular proceedings if the public interest so requires.

[2] *See, e.g.*, Public Notice, Commission Applies "Permit But Disclose" *Ex Parte* Rules to TRAC Complaint Proceeding, DA 88-1244 (August 8, 1988).

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: June 6, 1994

AT&T FILES A PETITION FOR WAIVER OF PRICE CAP RULES FOR ITS SIMPLE SAVINGS VOLUME DISCOUNT PLAN

Pleading Cycle Established

Comments: June 20, 1994
Replies: June 27, 1994

On May 17,1994, AT&T Corp. (AT&T) filed a petition for waiver of Sections 61.42(g), 61.43, 61.44(g), 61.46(b), and 61.47(b) of the Commission's Rules, 47 C.F.R. §§ 61.42(g), 61.43, 61.44(g), 61.46(b), and 61.47(b), in order to incorporate its Simple Savings plan offered pursuant to AT&T Tariff F.C.C. No. 1 into AT&T's Price Cap Index (PCI), Actual Price Index (API) and Service Band Index (SBI) calculations that become effective July 1, 1994.

AT&T describes Simple Savings as a volume discount plan which offers a 25 percent discount on basic LDMTS rates for calls completed to one domestic NPA designated by the customer and a 15 percent discount on basic LDMTS rates for calls to all other domestic NPAs in each month the customer's usage is $30.00 or higher. Customers must enroll, at no charge, in Simple Savings to receive these discounts.

Simple Savings is being introduced as a new service. Under the price cap rules, the costs and rates of new services will be incorporated into the PCI, API, and calculations "at the first annual price cap tariff filing following completion of the base period in which they are introduced." Therefore, AT&T would not be able to include Simple Savings in its price cap calculations until the price cap tariff filing scheduled to be effective July 1995. AT&T seeks a waiver of the above-referenced rules to enable it to include Simple Savings in its price cap calculations as of July 1, 1994.

Parties may file comments on this petition no later than **June 20, 1994**. Replies should be filed by **June 27, 1994**.

An original and four copies of all comments and replies must be filed in accordance with Section 1.51(c) of the Commission's Rules, 47 C.F.R. § 1.51(c). In addition, one copy of each pleading must be filed with International Transcription Services (ITS), the Commission's duplicating contractor, at its office at 2100 M Street, N.W., Suite 140, Washington, D.C. 20037 and one copy with the Chief, Tariff Division, Room 518, 1919 M Street, N.W., Washington, D.C. 20054.

For further information, contact Wanda M. Harris, Tariff Division, Common Carrier Bureau, (202) 632-6917.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Complaint of

DIANNE FEINSTEIN,
JOHN SEYMOUR,
and THOMAS HAYES

Against Station KABC-TV
Los Angeles, California

MEMORANDUM OPINION AND ORDER

Adopted: April 18, 1994; Released: June 7, 1994

By the Commission: Commissioner Quello dissenting and issuing a statement.

I. INTRODUCTION

1. The Commission has before it a Motion for Stay of an *Order* by the Chief, Mass Media Bureau, released March 18, 1994 (DA 94-247), filed by ABC Holding Co., Inc. ("ABC") licensee of KABC-TV, Los Angeles, California. For the reasons which follow, we will deny the Motion.

II. BACKGROUND

2. The *Order* found that a *prima facie* case of a violation by KABC-TV of the Commission's lowest unit charge requirements was made by Complainants Dianne Feinstein, John Seymour and Thomas Hayes with respect to advertising aired on their behalf during the 45 days before the June 5, 1990, California primary. Other claims by Complainants were dismissed. The parties were ordered to follow the timetable and procedures for discovery, post-discovery, and election of a complaint resolution procedure set forth therein. The first discovery deadline in the *Order* is April 18, 1994.

3. On March 30, 1994, ABC filed an Application for Review of the *Order*. Also on March 30, ABC filed its Motion asking for a stay of the Bureau's *Order*, pending Commission action on the Application for Review thereof.

III. THE MOTION

4. The Motion summarizes ABC's view, as set forth in the Application for Review, which ABC attaches, that the Bureau's *Order* is wrong. Moreover, ABC argues that the *Order* imposes extensive discovery burdens that do not relate to the nature of the claim at issue and that those burdens would be extremely costly and time consuming. ABC states that its discovery obligations are not permitted by "the Commission's Section 315(b) procedures," and, therefore, adherence to them would cause KABC to irreparably lose its legal rights.

5. ABC also claims that the public interest in coverage of political campaigns militates strongly in favor of the relief requested, because the same personnel who would be involved in the discovery are currently devoting significant time to the sale of time to political candidates. Furthermore, ABC states that "a stay will serve the public interest in ensuring 'timely and fair' procedures in resolving Section 315(b) complaints." Finally, ABC indicates that a stay will not harm the complaining candidates, who waited until two years after the primary at issue to file their complaint.

IV. DISCUSSION

6. Pursuant to Section 1.102(b)(3) of the Commission's Rules, 47 C. F. R. 102(b)(3), grant of the stay requested by ABC is discretionary. We find it helpful to rely on the guidelines set forth in *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921 (D.C. Cir. 1958) to determine whether a stay is warranted in this case. Under those guidelines, a petitioner must demonstrate (1) that it is likely to prevail on the merits of its pending appeal; (2) that without the relief sought, the petitioner will be irreparably injured; (3) that the issuance of the stay would not substantially harm other interested parties; and (4) that grant of the stay is in the public interest.

7. We will not prejudge the merits of the Application for Review filed by ABC, which is still pending before us. Even without addressing the requirement that ABC show its likelihood of prevailing, however, ABC has not met the other requirements for a stay. First, ABC has not shown that it will be irreparably injured by the Bureau's *Order*. We recognize that the discovery obligations set forth therein may involve some time and cost, as is always true of discovery. Nevertheless, we do not consider the procedures overly burdensome, and ABC has not shown otherwise.

V. ORDERING CLAUSES

8. ACCORDINGLY, IT IS ORDERED, That the Motion for Stay filed March 30, 1994, by ABC Holding Co., Inc., licensee of KABC-TV, IS DENIED. IT IS FURTHER ORDERED, That ABC SHALL COMPLY with the procedures and timetable for discovery, post-discovery, and election of a complaint resolution procedure established in *Order*, DA 94-247, released March 18, 1994.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

DISSENTING STATEMENT OF COMMISSIONER JAMES H. QUELLO

Complaint of Dianne Feinstein, John Seymour, and Thomas Hayes

In this Memorandum Opinion and Order, the Commission denies a motion for stay of an Order issued by the Chief of the Mass Media Bureau finding that a prima facie case of a violation by KABC-TV of the Commission's lowest unit charge requirements was established by complainants Dianne Feinstein, John Seymour and Thomas Hayes. The Commission then orders KABC-TV to comply with the procedures and timetable for discovery set forth in the Bureau's Order. At issue are advertisements aired during the 45 days before the June 5, 1990, California primary. The reason given for denying the motion is that KABC-TV has not met the legal requirements for a stay. I do not disagree with the technical application of the legal guidelines for granting a stay to the case before us. I do, however, strongly disagree with this Agency's continued application of clearly flawed procedures, in particular discovery procedures, for lowest unit charge cases generally, and to the case involving KABC-TV in particular. I therefore cannot support this or any other decision by this Commission which relies on these procedures.

As to my general disagreement with the procedures for handling lowest unit charge cases, I have previously set forth in some detail my longstanding concerns. In the Declaratory Ruling, Exclusive Jurisdiction With Respect to Potential Violations of the Lowest Unit Charge Requirements, 6 FCC Rcd. 7511 (1991), I dissented to the decision to adopt new procedures for handling lowest unit charge complaints by candidates. In general, I expressed concern with adopting new procedures for handling lowest unit charge complaints without notice and comment, with minimal internal analysis, and without even a mention of the Commission's existing complaint procedures. I was further concerned that adopting procedures under such circumstances would serve only to make matters worse, specifically:

> Will the new procedures allow candidates to make a prima facie case and obtain quick relief or will they delay matters? Will they encourage the filing of speculative complaints, thus requiring the extension of our abuse of process rules? Will the number of complaints diminish now that the Commission is clarifying the political rules or will the volume of complaints under the new procedures create an administrative nightmare? We simply do not know. And, unfortunately, there was insufficient interest at the Commission in taking the time to find out.

I reiterated these concerns in my Separate Statement in the Order on Reconsideration 7 FCC 2d 4123 (1992), of the Declaratory Ruling.

Likewise, in the first case to apply the Commission's new lowest unit charge procedures, I dissented to the majority's decision to uphold a discovery order issued by the Mass Media Bureau. In that case, Complaint of Lawton Chiles, Bob

Martinez, and Bill Nelson Against Station WTVT(TV), 7 FCC Rcd 6661 (MMB, 1992), review denied, 8 FCC Rcd 131 (1992). I dissented on the grounds that the discovery order was procedurally deficient, overlooked key requirements for making a prima facie case, and perpetuated a cumbersome and counterproductive process. Of the numerous deficiencies noted in my dissent, perhaps the most important was the manner in which the majority relied on average market data to establish a prima facie case of a lowest unit charge violation. The use of average market data in the WTVT case was problematic in that it ignored the influence of class of advertising time on lowest unit charge determinations and it focused primarily on average rates in a market rather than the rates of a specific station. Thus, the scheme adopted by the Bureau and affirmed by the Commission assures that the highest ranked stations in the market will be subject to complaints while lower ranked stations will be insulated from liability, regardless of whether they have in fact overcharged candidates. Finally, I noted that the majority decision in WTVT reinforced my previous concern "that the Commission has created unworkable procedures that will further confuse this difficult area of our rules." I noted the likely time frame for completion of the discovery phase of the WTVT case (one year), and the 80,000 pages of documents provided to date by the complainants.

My early concerns with the ill-conceived lowest unit charge complaint procedures have been borne out in several respects: (1) in the lengthy delays in processing these lowest unit charge complaints, which are due, in large part, to the complexity of the procedures; (2) in the filing of speculative complaints; and (3) in the resulting administrative nightmare. Since the adoption of these discovery procedures in 1991, the Bureau has issued a decision after completing discovery in one case (the WTVT case), found that a prima facie case was established in two cases, including against KABC-TV, dismissed two complaints, and 12 cases have been settled by the parties. In the decision in WTVT, after more than two years and tens of thousands of pages of documents, the Bureau found that WTVT had overcharged candidates by $1175. 9 FCC Rcd 1593 (1994). In the meantime, at least 27 lowest unit charge complaints -- all of which were filed by a single law firm -- are languishing in an administrative black hole.

Also in the meantime, I am well aware that a significant number of broadcasters are settling complaints with candidates represented by the law firm referenced above. These settlements, I must believe, are a result of broadcasters' fear of the low hurdle for establishing a prima facie case of a violation, and the ensuing delay and expense of the subsequent discovery procedures.

I cannot in good conscience vote to allow discovery to proceed -- despite the legal posture of this case -- given the significant questions that have been raised regarding the Bureau's finding of a prima facie case. Specifically, KABC alleges that the Bureau permitted the complainant-candidates to withdraw one type of average market date ("SQAD") after KABC demonstrated that those data, contrary

to the allegations of the complainants, demonstrated that the complaint should be dismissed. According to KABC, the Bureau then accepted the complainants second attempt to prove their claims by permitting them to submit another type of industry-wide data ("SCOOP"). Thus, KABC argues, it appears that the Bureau intends to allow complainants to "shop around" for the average market data that best fits their claims, and intends to ignore any conflicting data. While the substantive allegations by KABC are not now technically before us, I cannot ignore for purposes of procedural convenience, the arguments of KABC.

I intend to pursue these issues further if, and when, this case reaches us in what the majority views as the appropriate procedural vehicle.These procedural rules, as painfully evident in this case, clearly harm broadcasters by making it all but impossible to avoid costly and expensive discovery once a complaint is filed. These procedural rules clearly do not further the enforcement of our lowest unit charge rules given that the only case reaching conclusion found only a $1175 overcharge of hundreds of thousands of dollars in candidate charges. These procedural rules also do not further the cause of candidates, whose complaints are languishing in an administrative black hole. These procedural rules have furthered the cause of only one party: the law firm that is profiting from the procedural monster the Commission has created.

For these reasons, I dissent.

Before the
Federal Communications Commission
Washington, D.C. 20554

ET Docket No. 94-45

In the Matter of

Revision of Part 2 of the Commission's rules relating to the marketing and authorization of radio frequency devices. RM-8125

NOTICE OF PROPOSED RULE MAKING

Adopted: May 9, 1994; Released: June 9, 1994

By the Commission:

Comment Date: September 6, 1994
Reply Comment Date: October 6, 1994

INTRODUCTION

1. By this action, the Commission proposes to amend the marketing regulations and the equipment authorization procedures that apply to radio frequency (RF) devices.[1] The proposed changes are intended to remove certain inconsistencies in the existing rules and to consolidate in the rules several interpretations issued in letters. These inconsistencies have lead to confusion for industry and may have discouraged or prevented use of some otherwise legitimate methods of marketing RF devices pending receipt of an authorization from the Commission. These proposals would stimulate economic growth by permitting products to be developed on a cooperative basis by manufacturers and retailers, and by potentially decreasing the time for a product to reach the marketplace. This action is partially in response to a petition for rule making filed by the Consumer Electronics Group of the Electronic Industries Association (EIA/CEG).[2]

BACKGROUND

2. Subpart I of Part 2 of the Commission's rules contains the regulations governing the marketing of RF devices. These rules describe the conditions that must be met before an RF device may be marketed in the United States. Subpart J of Part 2 of the rules specifies the equipment authorization procedures that apply to RF devices.[3] These rules describe the procedures that must be followed to obtain equipment authorization, the procedures used by the Commission to administer the equipment authorization program, and the responsibilities of equipment manufacturers and importers.

MARKETING REGULATIONS

3. *Existing rules.* In general, the marketing regulations prohibit the marketing of RF devices prior to a demonstration of compliance with the applicable technical standards and compliance with the Commission's equipment authorization requirements.[4] Exceptions to the marketing regulations rules are provided in Section 2.806, which permits certain digital devices to be: 1) announced and offered for sale prior to authorization; 2) operated for compliance testing; 3) operated for performance evaluation at the manufacturer's or user's site; 4) demonstrated at a trade show; and 5) tested for compliance at the end user's site after installation.[5] In addition, Section 2.809 provides similar exceptions to the marketing rules for industrial, scientific, and medical (ISM) devices subject to the provisions in Part 18 of the rules.[6] Further, Section 2.803 permits the advertising and display, but not activation, of products that require type acceptance, certification or notification prior to obtaining a grant of authorization as long as the advertising or display is accompanied by a notice that the equipment has not been authorized and may not be marketed until Commission authorization is obtained.[7] However, Section 2.805, which addresses the marketing of devices that are not required to be authorized by the Commission, *e.g.*, devices subject to authorization under the verification pro-

[1] *See* 47 CFR Part 2, Subpart I. RF devices are products that in their operation are capable of emitting radio frequency energy. *See* 47 CFR Section 2.801. Examples of RF devices include radio receivers, computers, video cassette recorders, and radio transmitters.

[2] *See* Petition for Rulemaking filed by EIA/CEG on October 16, 1992, RM-8125. The Commission is also making proposals addressing several additional changes to remove inconsistencies and clarify existing equipment authorization regulations, to remove outdated and unnecessarily restrictive regulations, and to correct erroneous rule citations.

[3] *See* 47 CFR Part 2, Subpart J. The equipment authorization procedures are: type approval, type acceptance, certification, notification and verification. Type approval, though still referenced in the rules, is no longer used. Under type acceptance, certification, and notification, the equipment must be tested to show compliance with the technical standards and other operating requirements contained in the rule parts under which it will operate. An application for authorization must be submitted to, and evaluated by, the Commission before it will issue a grant of type acceptance, notification, or certification. Products subject to the verification procedure must be tested to demonstrate compliance with the standards; however, this information is not required to be submitted to the Commission unless specifically requested.

[4] Marketing includes sale or lease, offers for sale or lease (including advertising for sale or lease), and importation, shipment or distribution for the purpose of sale or lease or offering for sale or lease. *See* 47 CFR Sections 2.803 and 2.805.

[5] Various conditions attach to these exceptions to the marketing rules, *e.g.*, operation at the user's site prior to authorization is limited to Class A (commercial, industrial, or business) digital devices that are in the development, design or preproduction stages and where, because of size or unique capability, customer acceptability cannot be determined at the manufacturer's facilities. *See* 47 CFR Sections 2.806 and 15.3(h).

[6] *See* 47 CFR Section 2.809. Additional exceptions are provided in 47 CFR Sections 2.811 and 2.813 for broadcast transmitters operating under Part 73 of the rules and instructional television fixed transmitters operating under Subpart I of Part 74 of the rules.

[7] *See* 47 CFR Section 2.803.

cedure, does not contain any provisions that permit advertising or display before a product has been demonstrated to comply with the applicable standards.[8]

4. *EIA/CEG Petition.* In its petition, EIA/CEG requests that the Commission consolidate and harmonize Sections 2.803, 2.805 and 2.806 of the rules. Specifically, EIA/CEG requests that we permit all RF devices to be announced, advertised, displayed, activated at trade shows, and offered for sale prior to authorization or determination of compliance with the technical standards, provided final delivery to the buyer or centers of distribution does not occur prior to compliance with the equipment authorization procedures. EIA/CEG also proposes that the advertising, display, or announcement and offer for sale of an RF device prior to authorization or a determination of compliance be accompanied by a conspicuous notice that the product has not been approved and must comply with the Commission's rules prior to final delivery. EIA/CEG further requests that the rules be amended to permit, during the development, design or preproduction stages, the operation of any RF device at a customer's site to evaluate product performance and determine customer acceptability where this cannot be determined at the manufacturer's facilities because of size or unique capability of the device.

5. EIA/CEG suggests that the inconsistent provisions of the existing rules have lead to confusion for industry, with the result that vendors of consumer electronics equipment are denied significant opportunities to promote their products to potential customers. EIA/CEG states that the changes it proposes would create an important avenue for the promotion and introduction of new products without increasing the potential for harmful interference to radio users.

6. *Comments.* Comments responding to this petition were filed by the National Association of Broadcasters (NAB), and reply comments were filed by EIA/CEG. NAB agrees with EIA/CEG that the present marketing rules are confusing and in need of amendment. However, NAB expresses concern that the changes proposed by EIA/CEG are too general and could lead to RF interference problems. NAB suggests modifications to the notice proposed by EIA/CEG warning that the product must comply prior to final delivery and requests that this notice also be required for product demonstrations, products operated for the purpose of compliance testing, and products operated at a user's site for evaluation of product performance and determination of customer acceptability. NAB further requests that, prior to demonstration of RF devices at trade shows or at potential customer's sites, manufacturers be required to perform preliminary interference testing and that a certification of such testing accompany the demonstration device.

7. EIA/CEG, in reply comments, suggests that NAB's request to require preliminary interference testing, with a certification of that testing to accompany the demonstration, is not necessary or appropriate. Alternatively, EIA/CEG proposes that the manufacturer certify that the product is "designed with the intent of compliance with all applicable FCC requirements." EIA/CEG also states that it sees no need to require labelling of a product during compliance testing, developmental operations at the manufacturer's own facilities, or similar activities. It adds that the intent of the labelling requirement is to advise the public that the product is not yet approved and that no sales transaction can be consummated until such approval is obtained.

8. *Discussion.* We agree with EIA/CEG and NAB that changes to the existing marketing rules should be made to remove inconsistencies and unnecessary restrictions. In particular, we agree that: 1) the marketing provisions in Section 2.803, permitting advertising and display prior to authorization, should apply to all RF devices including those requiring verification; and, 2) any RF device should be permitted to be operated for compliance testing, demonstration at a trade show, or product evaluation at the manufacturer's facilities.[9] However, we are concerned about some of the other changes sought by EIA/CEG because of their potential to allow non-compliant devices to be sold or provided to the general public, thereby possibly resulting in significant interference and enforcement problems. Accordingly, we are proposing changes that address our concerns and still provide significant harmonization and relaxation of the existing marketing rules in order to facilitate product marketing by equipment manufacturers.[10] Our proposed changes to the regulations are set forth in the attached Appendix B and are discussed in the following paragraphs.

9. In adopting the marketing rules in 1970, the Commission emphasized that its actions were designed to stop mass-marketed devices from reaching the public before a grant of equipment authorization had been obtained.[11] The Commission rejected a request to permit RF devices to be sold, but not delivered, to the general public before a determination of compliance and authorization of the equipment. In 1991, the Commission reaffirmed its decision to prohibit the delivery of products to consumers before the products are fully compliant with the regulations.[12] EIA/CEG's petition would permit equipment to be

---

[8] *See* 47 CFR Section 2.805. The Commission has, however, by interpretation permitted manufacturers of products subject to the marketing rules in Section 2.805 to display and advertise those products following the procedures in 47 CFR Section 2.803. *See* letter of January 8, 1992, from Richard B. Engelman, Chief, Technical Standards Branch, Office of Engineering and Technology, FCC, to John M. Bianchi, Senior Engineer, Compliance Engineering, Toshiba America Consumer Products, Inc.

[9] Station licenses or operating authorities would still have to be obtained for devices that operate under rule sections that require such station licensing.

[10] Because the marketing exceptions for radio frequency devices operated under Part 18 of our rules are similar to those for digital devices, we have combined these two sections in our proposal.

[11] *See Report and Order,* Docket No. 18426, 35 FR 7898, May 22, 1970, at para. 12. Since the implementation of these rules, the provisions of Sections 2.803, 2.806 and 2.809 permitting the advertising of non-authorized devices have been added. *See Memorandum, Opinion and Order,* RM-2573 and RM-2601, 58 FCC 2d 784; *Order Granting in Part Reconsideration,* Docket No. 20780, 45 FR 24154, April 9, 1980; *Report and Order,* Gen. Docket No. 81-463, 47 FR 13812, April 1, 1982; and, *Third Report and Order,* GEN Docket No. 20718, 50 FR 36067, September 5, 1985.

[12] *See Memorandum, Opinion and Order,* GEN Docket No. 87-389, 6 FCC Rcd 1683 (1991) at para. 19. In this action, the Commission indicated that conditional sales contracts between manufacturers and wholesalers or retailers and agreements to produce new products, manufactured in accordance with designated specifications, are permissible where delivery of devices is contingent upon a grant of equipment authorization. Such

offered for sale or lease, but not delivered, to any customer (including consumers) prior to equipment authorization, provided the buyer is advised in writing that the device has not yet been approved by the Commission. As the Commission decided previously, we do not believe it would be realistic to permit consumer devices to be offered for sale to potentially millions of people and expect delivery of the devices to await a Commission authorization.[13] Enforcement of such a program would be unmanageable. We note that Section 2.806(a) of our rules already permits the offer for sale, prior to equipment authorization, of digital devices that are subject to verification provided: 1) the devices are in the conceptual, developmental, design or preproduction stage; 2) the prospective buyer is advised in writing at the time of announcement or offer for sale that the devices are subject to the Commission's rules and that the equipment will comply with the appropriate rules prior to delivery to the buyer or centers of distribution; and, 3) the devices are not delivered prior to verification.[14] Section 2.809(a) permits the offer for sale of Part 18 industrial, scientific and medical equipment under the same conditions.[15] While the above exceptions do not specifically exclude sales to consumers, the practical constraints make such sales infeasible. We now believe it is appropriate, and thus are proposing, to permit all types of RF devices to be offered for sale prior to equipment authorization to parties other than consumers, *i.e.*, business, commercial, industrial, scientific, and medical users, subject to the above conditions. This proposal would also make it clear that no RF devices may be offered for sale to the general public prior to compliance with the standards, including the equipment authorization requirements.

10. EIA/CEG also requests that the Commission permit RF devices to be operated at customers' sites prior to authorization to evaluate product performance and determine customer acceptability. Sections 2.806(c)(4) and 2.809(c)(3) permit such operation, but only for Class A digital devices and Part 18 ISM equipment. As expressed previously, we have been reluctant to expand this exemption too broadly because of the possibility that a large quantity of untested and potentially noncompliant equipment could end up in the hands of the general public. Should that happen, it would be very difficult to trace the ultimate owner of the equipment so that it could be recalled or modified. Accordingly, we are proposing to expand the exceptions in Sections 2.806(c)(4) and 2.809(c)(3) to allow the operation of all types of RF devices prior to equipment authorization, but only at the sites of business, commercial, industrial, scientific, and medical users.[16]

11. EIA/CEG also requests that parties responsible for verification of RF devices be given the option of performing compliance testing at the customer's location after sale and installation. Sections 2.803(b) and 2.809(b) allow such testing of Class A digital devices and nonconsumer Part 18 ISM equipment. Again we do not believe it appropriate to allow the installation of untested equipment at consumer locations. However, we believe such an approach is workable for devices marketed on a more limited basis. We therefore are proposing to expand these exceptions only for business, commercial, industrial, scientific, and medical user sites.[17]

12. These proposed changes should harmonize the marketing rules for all RF devices regardless of the rule part under which they operate. However, EIA/CEG indicates that it would not object if the Commission excluded devices subject to authorization under type acceptance from the scope of the proposed rule changes. Such an exclusion would, if adopted, effectively limit the requested harmonization to RF devices operating under Parts 5, 15, and 18, as well as to some transmitters operating under Parts 21, 73, 74, 78, 80, and 94.[18] While we are not proposing to limit the exceptions in this manner, we invite comment on whether such limitation may be appropriate.

EQUIPMENT AUTHORIZATION RULES

13. We are also proposing a number of other changes to the equipment authorization rules in Subpart J of Part 2. Similar to the proposed marketing rule changes, these proposed changes are intended to resolve inconsistencies and remove unnecessary restrictions in the equipment authorization rules. These proposals, which are set forth in Appendix B, address the regulations regarding the modification of authorized devices, the definition of an electrically-identical product, the retention of records for verified devices in the responsible party's files, and the provisions addressing the submission to the Commission of data or samples for verified devices.[19]

---

normal business activities do not involve the general public. We are incorporating the text of this ruling within our proposal.

[13] *See Memorandum, Opinion and Order*, GEN Docket No. 87-389, *supra.*, at para. 19.

[14] *See* 47 CFR Section 2.806(a). Digital devices subject to authorization under the verification procedure include all Class A and some Class B digital devices. Class A digital devices are digital devices, such as computers, that are marketed for use solely in a commercial, industrial, or business environment and do not include devices which are marketed for use by the general public or for use in other environments, including the home. Class B digital devices are digital devices that may be used by the general public in any environment, including the home. Class B personal computers and personal computer peripherals are subject to certification. All other Class B digital devices, such as typewriters and hand-held video games, are subject to verification. *See* 47 CFR Sections 15.3(h), 15.3(i), and 15.101.

[15] *See* 47 CFR Section 2.809(a).

[16] We are also proposing that any devices be designed with the intent of complying with all applicable regulations, as suggested by EIA/CEG.

[17] We note, however, that Sections 15.31(d) and 15.201(c) allow compliance testing of Part 15 devices at consumer locations when measurements can be performed only at the installation site. *See* 47 CFR Sections 15.31(d) and 15.201(c).

[18] Type acceptance applies to transmitters operated under Parts 21, 22, 74, 78, 80, 87, 90, 94, and 95, to AM stereo exciter-generators and emergency broadcast system encoders operated under Part 73, and to external radio frequency power amplifiers operated under Part 97. In some cases, however, transmitters used for specific applications under these rule parts are subject to notification instead of type acceptance, *e.g.*, fixed transmitters operating under Part 94.

[19] For clarity, we are also proposing to modify the rules to indicate explicitly that, as with any request for authorization, an anti-drug abuse statement is required with requests for permissive changes. This is, of course, already the case under the Commission's existing general anti-drug abuse rules (*see* 47 CFR Section 1.2002), but we believe it will be helpful to also

14. *Modification of authorized devices.* The Commission observes that it has become a fairly common practice for RF devices, especially those intended for sale to the general public, to be modified by someone other than the grantee of the equipment authorization. In this regard the regulations contain specific provisions to permit someone other than the grantee to modify type accepted devices provided new measurement data is filed with the Commission.[20] However, for type accepted, certified or notified products, the existing rules state that the party responsible for ensuring that a product complies with the standards is the grantee.[21] For verified products, the rules state that the party responsible for ensuring compliance is the manufacturer or, in the case of imported equipment, the importer.[22] The rules do not address who is responsible for compliance of the equipment when it is modified by someone other than the grantee or, for verified devices, the manufacturer or importer.[23]

15. It is not realistic to require the party that obtained the original authorization to accept responsibility for ensuring that it complies with the standards when that product is modified by an independent party. Similarly, the Commission cannot reasonably require the holder of the grant of equipment authorization or, in the case of verified equipment, the manufacturer or importer to retain measurement data and other records demonstrating that the product, as modified by a separate party, continues to comply with the standards.[24] We are proposing to resolve this inconsistency in the regulations, and the improper burden placed by these rules on the currently-designated responsible party, by amending the rules to state that any party that subsequently modifies an authorized device becomes the party responsible (the "Responsible Party") for ensuring compliance of the modified device with the standards and for retaining measurement data demonstrating compliance.[25] In order to facilitate identification, we are also proposing that the modified product be labelled indicating that it was modified and specifying the name, address and telephone number of the new Responsible Party. Comments are requested as to any additional requirements that should be considered for modified devices.

16. *Electrically identical products.* The rules permit a grantee to change the "model/type number" and trade names of electrically identical products without notification to the Commission.[26] However, these rules do not define what is meant by "electrically identical." Accordingly, we are proposing to amend the rules to clarify that a product is considered to be "electrically identical" if no changes are made to the product authorized by the Commission, or if the changes made to the product could be treated under the provisions of type acceptance or certification as "Class I" permissive changes.[27]

17. *Retention of records for verified devices.* On February 29, 1988, the Commission released a Public Notice detailing the information that is required to be retained by the responsible party in the data file for verified devices.[28] That information includes the name of the company that performed the measurements, identification of the equipment under test, photographs of the test set-up, and other data to facilitate assurance that the product was properly tested to demonstrate compliance with the standards. However, the requirements contained in that Public Notice were never incorporated into the regulations. We are now proposing to so incorporate the list of information set forth in the Public Notice.[29]

18. *Requests for data or test samples.* Any party holding a grant of equipment authorization from the Commission, *i.e.*, type acceptance, certification or notification, is required, within 60 days, to submit test samples or data upon request by the Commission.[30] While the existing rules provide the Commission with the authority to request samples or test data for devices authorized under verification, the regulations do not specify any time limits for providing this data.[31] To remove this disparity, we are proposing to require samples or data for verified devices to be submitted to the Commission within the same time limits currently applied to products covered under the other forms of

---

include the requirement in our Part 2 rules. (See the changes proposed to 47 CFR Section 2.932.) We are also proposing, for clarity, to amend the rules to indicate that proper labelling of a product is a condition of the grant of equipment authorization and is required prior to marketing. (See the changes proposed to 47 CFR Sections 2.803, 2.925, and 2.927.) In addition, we are proposing to remove outdated regulations, *e.g.*, references to type approval which is no longer employed. (See the changes proposed to 47 CFR Sections 2.901, 2.903, 2.915, 2.917, 2.925, 2.931, and 2.961-2.969.) We are also proposing to combine duplicative rules into single rules sections. (See the changes proposed to 47 CFR Section 2.927(b) and (d) and to 47 CFR Sections 2.956 and 2.957.) Similarly, we are proposing to delete 47 CFR Sections 2.979, 2.1003 & 2.1033 which duplicate other rules in Part 2. Finally, we are proposing to correct erroneous rule citations, *e.g.*, printing errors and citations resulting from earlier, unrelated rule making proceedings that changed rule section numbers without making corresponding amendments in Part 2. (See the changes proposed to 47 CFR Sections 2.815, 2.913, 2.925, 2.926, 2.933, 2.934, 2.941, 2.975, 2.983, 2.1005, 2.1033, and 2.1300.)

[20] *See* 47 CFR Section 2.1001(b)(3). While the regulations also permit anyone to modify notified devices, there is no requirement to file new measurement data with the Commission. *See* 47 CFR Section 2.977.

[21] *See* 47 CFR Section 2.909(a).

[22] *See* 47 CFR Section 2.909(b).

[23] For products subject to certification, modifications by anyone other than the grantee, or its designated agent, are specifically prohibited unless the party performing the modifications obtains a new grant of certification. *See* 47 CFR Section 2.1043(b)(3).

[24] The designated responsible party is required to retain the records demonstrating compliance. *See* 47 CFR Sections 2.936, 2.938, 2.953, 2.955, and 2.975(g).

[25] *See* the proposed revisions in Appendix B to 47 CFR Sections 2.909, 2.936, 2.938, 2.946, 2.953, 2.955, 2.956, and 2.975. Of course, if the product has not been modified by an independent party the rules would continue to designate the grantee or, for verified devices, the manufacturer or importer as the Responsible Party.

[26] *See* 47 CFR Section 2.924. The rules also require that a new application for equipment authorization be filed whenever there is a change in identification that exceeds the provisions in Section 2.924. *See* 47 CFR Section 2.933.

[27] *See* the proposed changes to 47 CFR Sections 2.924 and 2.933.

[28] *See* Public Notice, 53 Fed. Reg. 5988, February 29, 1988. *See*, also, 47 CFR Section 2.955.

[29] *See* the proposed change in Appendix B to 47 CFR Section 2.955.

[30] *See* 47 CFR Section 2.946.}

[31] *See* 47 CFR Sections 2.956 and 2.957.

equipment authorization.[32] We are also proposing to amend the rules to indicate that the Responsible Party is required to supply the test sample or data.

ADMINISTRATIVE PROVISIONS

19. This is a non-restricted notice and comment rule making proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in the Commission's Rules. *See generally* 47 CFR Sections 1.1202, 1.1203, and 1.1206(a).

20. *Initial Regulatory Flexibility Analysis.* As required by Section 603 of the Regulatory Flexibility Act, the Commission has prepared an Initial Regulatory Flexibility Analysis (IFRA) of the expected impact on small entities of the proposals suggested in this document. The IFRA is set forth in Appendix A. Written public comments are requested on the IFRA. These comments must be filed in accordance with the same filing deadlines as comments on the rest of the Notice, but they must have a separate and distinct heading designating them as responses to the Initial Regulatory Flexibility Analysis. The Secretary shall send a copy of this Notice of Proposed Rule Making, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601 *et seq* (1981).

21. *Comment dates.* Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. Sections 1.415 and 1.419, interested parties may file comments on or before **September 6, 1994** and reply comments on or before **October 6, 1994.** To file formally in this proceeding, you must file an original and four copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should send comments and reply comments to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

22. The proposed action is authorized under Sections 4(i), 302, 303(e), 303(f), and 303(r) of the Communications Act of 1934, as amended 47 U.S.C. Sections 154(i), 302, 303(e), 303(f), and 303(r).

23. For further information regarding this *Notice of Proposed Rule Making*, contact John Reed, Office of Engineering and Technology, (202) 653-6288.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

APPENDIX A

INITIAL REGULATORY FLEXIBILITY ANALYSIS

Reason for Action: This Notice of Proposed Rule Making responds to the petition submitted by the Electronic Industries Association, Consumer Electronics Group, to harmonize our rules regarding the announcement, advertising, display, activation and marketing of radio frequency (RF) devices prior to compliance with the applicable standards. On our own initiative, we are also proposing amendments to the Part 2 rules to address the responsibility of parties that modify products prior to sale, and to establish a time frame within which samples or records files of verified devices must be submitted to the Commission upon request. In addition, we are proposing to amend the equipment authorization rules to clarify existing regulations, remove outdated regulations, and correct erroneous rule citations.

Objectives: The objectives of this proposal are to facilitate the marketing and display of RF devices, to identify the party ultimately responsible for ensuring that a marketed device complies with the standards, to facilitate the retrieval of test records by the Commission, to clarify existing regulations, to remove outdated regulations, and to correct existing errors in the rules.

Legal Basis: The proposed action is authorized under Sections 4(i), 302, 303(e), 303(f), and 303(r) of the Communications Act of 1934, as amended 47 U.S.C. Sections 154(i), 302, 303(e), 303(f), and 303(r).

Reporting, Record Keeping and Other Compliance Requirements: One change to the reporting and record keeping requirements would be initiated by this proposal: parties that take authorized RF devices and remanufacture or otherwise modify those products prior to marketing would be designated as the parties responsible for ensuring that the products comply with the applicable rules and, thus, would have the same reporting and record keeping requirements that normally apply to an equipment manufacturer.

Federal Rules Which Overlap, Duplicate or Conflict With These Rules: None

Description, Potential Impact and Number of Small Entities Involved: It is unknown how may small entities that may be affected. There should be no adverse impact on any party that manufactures or markets equipment that currently complies with our standards.

Any Significant Alternatives Minimizing the Impact on Small Entities Consistent with Stated Objectives: None

APPENDIX B

Title 47 of the Code of Federal Regulations, Part 2, is amended as follows:

1. The authority citation for Part 2 continues to read as follows:

[32] *See* the proposed change in Appendix B to 47 CFR Section 2.946. For additional clarity, we also propose to incorporate a reference to this requirement in 47 CFR Sections 2.953 and 2.956.

AUTHORITY: Sections 4, 302, 303, and 307 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154, 154(i), 302, 303, 303(r), and 307, unless otherwise noted.

2. Section 2.803 is deleted.

3. A new Section 2.803 is added to read as follows:

Section 2.803 *Marketing of Radio Frequency Devices Prior to Equipment Authorization.*

(a) No person shall sell or lease, or offer for sale or lease (including advertising for sale or lease), or import, ship, or distribute for the purpose of selling or leasing or offering for sale or lease, any radio frequency device unless:

(1) In the case of a device subject to type acceptance, certification, or notification, such device has been authorized by the Commission in accordance with the rules in this Chapter and is properly identified and labelled as required by Section 2.925 and other relevant sections in this Chapter; or

(2) In the case of a device that is not required to have a grant of equipment authorization issued by the Commission, but which must comply with the specified technical standards prior to use, such device also complies with all applicable administrative (including verification of the equipment, where required), technical, labelling and identification requirements specified in this Chapter.

(b) The provisions of paragraph (a) do not forbid conditional sales contracts between manufacturers and wholesalers or retailers where delivery is contingent upon compliance with the applicable equipment authorization and technical requirements, nor do they prohibit agreements between parties to produce new products, manufactured in accordance with designated specifications.

(c) Notwithstanding the provisions of paragraph (a), a radio frequency device may be advertised or displayed, *e.g.*, at a trade show or exhibition, prior to equipment authorization or, for devices not subject to the equipment authorization requirements, prior to a determination of compliance with the applicable technical requirements *provided* the advertising contains, and the display is accompanied by, a conspicuous notice worded as follows:

> This device has not been authorized as required by the rules of the Federal Communications Commission. This device is not, and may not be, offered for sale or lease, or sold or leased, until authorization is obtained. Except as provided elsewhere in this Chapter, devices displayed under the provisions of this paragraph may not be activated or operated.

(d) Notwithstanding the provisions of paragraph (a), the announcement and offer for sale solely to business, commercial, industrial, scientific or medical users (but not to the general public) of a radio frequency device that is in the conceptual, developmental, design or preproduction stage is permitted prior to equipment authorization or, for devices not subject to the equipment authorization requirements, prior to a determination of compliance with the applicable technical requirements *provided* the prospective buyer is advised in writing at the time of announcement or offer for sale that the equipment is subject to the FCC rules and that the equipment will comply with the appropriate rules before delivery to the buyer or to centers of distribution.

(e) Notwithstanding the provisions of paragraph (a), any radio frequency device may be operated, but not marketed, prior to equipment authorization or determination of compliance with the applicable technical requirements for the following purposes:

(1) Compliance testing;

(2) Demonstration at a trade show provided the notice contained in paragraph (c) of this section is displayed in a conspicuous location on, or immediately adjacent to, the device;

(3) Evaluation of product performance and determination of customer acceptability, provided such operation takes place at the manufacturer's facilities during developmental, design or preproduction states; or,

(4) Evaluation of product performance and determination of customer acceptability where customer acceptability of a radio frequency device cannot be determined at the manufacturer's facilities because of size or unique capability of the device, provided the device is operated at a business, commercial, industrial, scientific, or medical user's site, but not at a residential site, during the development, design or preproduction stages. A product operated under this provision shall be labelled, in a conspicuous location, with the notice in paragraph (c) of this section.

(5) For the purpose of paragraphs (e)(3) and (e)(4) of this section, the term "manufacturer's facilities" includes the facilities of the party responsible for compliance with the regulations and the manufacturer's premises, as well as other entities working under the authorization of the responsible party in connection with the development and manufacture, but not marketing, of the equipment.

(6) The provisions of paragraphs (e)(1), (e)(2), (e)(3), and (e)(4) of this section do not eliminate any requirements for station licenses that may be specified elsewhere in this Chapter.

(f) For radio frequency devices subject to verification and sold solely to business, commercial, industrial, scientific, and medical users (excluding sales to the general public), parties responsible for verification of the devices shall have the option of ensuring compliance with the applicable technical specifications of this Chapter at each end user's location after installation, provided that the purchase or lease agreement includes a proviso that such a determination of compliance be made and is the responsibility of the party responsible for verification of the equipment.

(g) The provisions in paragraphs (b) - (f) of this section apply only to devices that are designed with the intent of compliance with all applicable requirements in this Chapter. The provisions in paragraphs (b) - (f) do not apply to radio frequency devices that could not be authorized or legally operated under the

current rules. Such devices shall not be operated, advertised, displayed, offered for sale or lease, sold or leased, or otherwise marketed.

4. Section 2.805 is deleted.

5. Section 2.806 is deleted.

6. Section 2.807 is amended by deleting the reference to Section 2.805 in the introductory paragraph.

7. Section 2.809 is deleted.

8. Section 2.811 is amended by deleting the reference to Section 2.805.

9. Section 2.813 is amended by deleting the reference to Section 2.805.

10. Section 2.815 is amended by changing the references in paragraphs (d) and (e) from Sections 97.75 and 97.76 to Sections 97.315 and 97.317.

11. Section 2.901 is amended by deleting the references in paragraphs (a) and (b) to type approval.

12. Section 2.903 is deleted.

13. Section 2.909 is amended by adding language to the end of paragraphs (a) and (b) and by adding a new paragraph (c) to read as follows:

Section 2.909 *Responsible party.*

(a) ... If radio frequency equipment is modified by any party other than the grantee and that party is not working under the authorization of the grantee pursuant to Section 2.929(b) of this Chapter, the party performing the modification is responsible for compliance of the product with the applicable administrative and technical provisions in this Chapter.

(b) ... If radio frequency equipment is modified subsequent to original manufacture or importation, the party performing the modification is designated as the responsible party.

(c) If, because of modifications performed subsequent to authorization, a new party becomes responsible for ensuring that a product complies with the technical standards, the equipment shall be labelled, following the specifications in Section 2.925(d) of this Chapter, with the following: "This product has been modified by [insert name, address and telephone number of the party performing the modifications]."

14. Section 2.913 is amended by revising the language in paragraphs (a) and (b) to read as follows:

Section 2.913 *Submittal of equipment authorization application or information to the Commission.*

(a) Applications and fees for equipment authorization shall be submitted to the address shown in Section 1.1103 of this Chapter unless otherwise directed.

(b) Any information or equipment samples requested by the Commission pursuant to the provisions of Subpart J of this Part shall, unless otherwise directed, be submitted to the FCC, Authorization and Evaluation Division, 7435 Oakland Mills Road, Columbia, MD 21046.

15. Section 2.915 is amended by deleting the reference to type approval in paragraphs (a) and (c).

16. Section 2.917 is amended by deleting paragraph (d).

17. Section 2.924 is amended to read as follows:

Section 2.924 *Marketing of electrically identical equipment having multiple trade names and models or type numbers under the same FCC Identifier.*

The grantee of an equipment authorization may market devices having different model/type numbers or trade names without additional authorization from the Commission provided such devices are electrically identical and the equipment bears an FCC Identifier validated by a grant of equipment authorization. A device will be considered to be electrically identical if no changes are made to the device authorized by the Commission, or the changes made to the device would be treated as Class I permissive changes within the scope of Sections 2.1001(b)(1) and 2.1043(b)(1) of this Chapter. Changes to the model number or trade name by anyone other than the grantee, or under the authorization of the grantee, shall be performed following the procedures in Section 2.933 of this Chapter.

18. Section 2.925 is amended by deleting paragraph (g) and subparagraphs (g)(1)-(g)(3), by changing the reference in subparagraph (b)(4) from Section 15.69(c) to Section 15.101, and by revising paragraph (d) to read as follows:

Section 2.925 *Identification of equipment.*

* * * * *

(b) * * *

* * * * *

(4) For a transceiver, the receiver portion of which is subject to verification pursuant to Section 15.101 of this chapter, the FCC Identifier required for the transmitter portion shall be preceded by the term "FCC ID:".

(c) [Reserved]

(d) In order to validate the grant of equipment authorization, the nameplate or label shall be permanently affixed to the equipment and shall be readily visible to the purchaser at the time of purchase.

* * * * *

19. Section 2.926 is amended by changing the reference in paragraph (e) from Section 15.69 to Section 15.101.

20. Section 2.927 is amended by deleting paragraph (d) and by revising paragraphs (a) and (b) to read as follows: Section 2.927 *Limitations on grants.*

(a) A grant of equipment authorization is valid only when the FCC Identifier is permanently affixed on the device and remains effective until revoked or withdrawn, rescinded, surrendered, or a termination date is otherwise established by the Commission.

(b) A grant of an equipment authorization signifies that the Commission has determined that the equipment has been shown to be capable of compliance with the applicable technical standards if no unauthorized change is made in the equipment and if the equipment is properly maintained and operated. The issuance of a grant of equipment authorization shall not be construed as a finding by the Commis-

sion with respect to matters not encompassed by the Commission's rules, especially with respect to compliance with 18 U.S.C. 2512.

(c) * * *

21. Section 2.931 is amended by deleting the reference to type approval.

22. Section 2.932 is amended by adding a new paragraph (f), to read as follows:

Section 2.932 *Modification of equipment.*

* * * * *

(f) All requests for permissive changes submitted to the Commission must be accompanied by the anti-drug abuse certification required under Section 1.2002 of this Chapter.

23. Section 2.933 is amended by revising paragraphs (a) and (c) and subparagraph (b)(7) to read as follows:

Section 2.933 *Change in identification of equipment.*

(a) A new application for equipment authorization shall be filed whenever there is a change in the identification of the equipment with or without a change in design, circuitry or construction. However, a change in the model/type number or trade name performed in accordance with the provisions in Section 2.924 of this Chapter is not be considered to be a change in identification and does not require additional authorization from the Commission.

(b) * * *

* * * * *

(7) In the case of certified equipment, the photographs required by Section 2.1033(b)(7) showing the exterior appearance of the equipment, including the operating controls available to the user and the identification label. Photographs of the construction, the component placement on the chassis, and the chassis assembly are not required to be submitted unless specifically requested by the Commission.

(c) If the change in identification also involves a change in design or circuitry which falls outside the purview of a permissive change described in Sections 2.977, 2.1001 or 2.1043, a complete application shall be filed pursuant to Section 2.911.

24. Section 2.934 is amended by changing the reference from Section 2.910(b) to Section 2.913(b).

25. Section 2.936 is amended to read as follows:

Section 2.936 *FCC inspection.*

Upon reasonable request, each responsible party shall submit the following to the Commission or shall make the following available for inspection:

(a) The records required by Sections 2.938 and 2.955.

(b) A sample unit of the equipment covered under an authorization.

(c) The manufacturing plant and facilities.

26. Section 2.938 is amended to read as follows:

Section 2.938 *Retention of records.*

(a) For each equipment subject to the Commission's standards, the responsible party shall maintain the records listed below:

(1) A record of the original design drawings and specifications and all changes that have been made that may affection compliance with the standards and the requirements of Section 2.931.

(2) A record of the procedures used for production inspection and testing to ensure conformance with the standards and the requirements of Section 2.931.

(3) A record of the test results that demonstrate compliance with the appropriate regulations.

(b) The provisions of paragraph (a) of this section shall also apply to a manufacturer of equipment produced under the provisions of Section 2.929(b) of this Chapter. The retention of the records by the manufacturer under these circumstances shall satisfy the grantee's responsibility under paragraph (a) of this section.

(c) The records listed in paragraph (a) of this section shall be retained for one year after the manufacture of said equipment has been permanently discontinued, or until the conclusion of an investigation or a proceeding if the responsible party (or under paragraph (b) of this section the manufacturer) is officially notified that an investigation or any other administrative proceeding involving its equipment has been instituted.

27. Section 2.941 is amended by replacing the reference in paragraph (b) to Section 0.457 with Sections 0.441-0.470.

28. Section 2.946 is amended by revising the introductory sentence in paragraph (a) to read as follows:

Section 2.946 *Penalty for failure to provide test samples and data.*

(a) Any responsible party, as defined in Section 2.909 of this Chapter, and any party who markets equipment subject to the provisions on this Chapter shall provide a test sample(s) or data upon request by the Commission. * * *

* * * * *

29. Section 2.953 is amended by revising the title and paragraphs (a), (b) and (d) to read as follows:

Section 2.953 *Responsibility for compliance.*

(a) In verifying compliance, the responsible party, as defined in Section 2.909 of this Chapter, warrants that each unit of equipment marketed under the verification procedure will be identical to the unit tested and found acceptable with the standards and that the records maintained by the responsible party continue to reflect the equipment being produced

under such verification within the variation that can be expected due to quantity production and testing on a statistical basis.

(b) The importer of equipment subject to verification may upon receiving a written statement from the manufacturer that the equipment complies with the appropriate technical standards rely on the manufacturer or independent testing agency to verify compliance. The test records required by Section 2.955 however should be in the English language and made available to the Commission upon a reasonable request, in accordance with Section 2.956 of this Chapter.

(c) * * *

(d) Verified equipment shall be reverified if any modification or change adversely affects the emanation characteristics of the modified equipment. The party designated in Section 2.909 of this Chapter bears responsibility for continued compliance of subsequently produced equipment.

30. Section 2.955 is amended by revising paragraph (a) and subparagraph (a)(3) to read as follows:

Section 2.955 *Retention of records.*

(a) For each equipment subject to verification, the responsible party, as shown in Section 2.909 of this Chapter, shall maintain the records listed below:

* * * * *

(3) A record of the measurements made on an appropriate test site that demonstrates compliance with the applicable regulations. The record shall:

(i) Indicate the actual date all testing was performed.

(ii) State the name of the test laboratory, company, or individual performing the verification testing. The Commission may request additional information regarding the test site, the test equipment or the qualifications of the company or individual performing the verification tests.

(iii) Contain a description of how the device was actually tested, identifying the measurement procedure and test equipment that was used.

(iv) Contain a description of the equipment under test (EUT) and support equipment connected to, or installed within, the EUT.

(v) Identify the EUT and support equipment by trade name and model number and, if appropriate, by FCC Identifier and serial number.

(vi) Indicate the types and lengths of connecting cables used and how they were arranged or moved during testing.

(vii) Contain at least two photographs showing the test set-up for the highest line conducted emission and showing the test set-up for the highest radiated emission. These photographs must be focused originals which show enough detail to confirm other information contained in the test report.

(viii) List all modifications, if any, made to the EUT by the testing company or individual to achieve compliance with the regulations.

(ix) Include all of the data required to show compliance with the appropriate regulations.

(x) Contain, on the test report, the signature of the individual responsible for testing the product along with the name and signature of an official of the responsible party, as designated in Section 2.909 of this Chapter.

* * * * *

31. Section 2.956 is revised to read as follows:

Section 2.956 *FCC inspection and submission of equipment for testing.*

(a) Each responsible party shall upon receipt of reasonable request:

(1) Submit to the Commission the records required by Section 2.955.

(2) Subject one or more sample units for measurements at the Commission's Laboratory.

(i) Shipping costs to the Commission's Laboratory and return shall be borne by the responsible party.

(ii) In the event the responsible party believes that shipment of the sample to the Commission's Laboratory is impractical because of the size or weight of the equipment, or the power requirement, or for any other reason, the responsible party may submit a written explanation why such shipment is impractical and should not be required.

(b) Requests for the submission of the records in Section 2.955 of this Chapter or for the submission of sample units are covered under the provisions of Section 2.946 of this Chapter.

32. Section 2.957 is deleted.

33. Section 2.961 is deleted.

34. Section 2.963 is deleted.

35. Section 2.965 is deleted.

36. Section 2.967 is deleted.

37. Section 2.969 is deleted.

38. Section 2.975 is amended by changing the reference in paragraph (b) from Section 2.909(c) to Section 2.911(c) and by revising paragraph (g) to read as follows:

Section 2.975 *Application for notification.*

* * * * *

(g) The records of measurement data, measurement procedures, photographs, circuit diagrams, etc. for a device subject to notification shall be retained for two years after the manufacture of said equipment has been permanently discontinued, or, if the responsible party is officially notified that an investigation or any other administrative proceeding involving the equip-

ment has been instituted prior to the expiration of such two year period, until the conclusion of that investigation or proceeding.

* * * * *

39. Section 2.979 is deleted.

40. Section 2.983 is amended by changing the reference in paragraph (i) from Subpart C of Part 97 to Subpart D of Part 97.

41. Section 2.1003 is deleted.

42. Section 2.1005 is amended by deleting the reference in paragraph (a) and subparagraph (c)(4) to Section 2.1003, by changing the reference in paragraph (c) from Section 97.3(z) to Section 97.3(a)(17), by changing the reference in paragraph (d) from CB Rule 21 to Section 95.411, and by changing the reference in paragraph (d) from Section 97.77 to Section 97.317.

43. Section 2.1033 is amended by changing the reference in subparagraph (b)(11) from Section 15.257(e) to Section 15.247(e).

44. Section 2.1045 is deleted.

45. Section 2.1300 is amended by changing the reference from Section 2.909 to Section 2.911.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Gary H. Anderson NAL/Acct. No. 315AN0013
Chignik Lagoon, Alaska

ORDER

Adopted: May 24, 1994; Released: June 14, 1994

By the Chief, Field Operations Bureau:

I. INTRODUCTION

1. Gary H. Anderson filed a Petition for Reconsideration, requesting reconsideration of the monetary forfeiture of $2,000 issued pursuant to Section 503, 47 U.S.C. § 503, for violation of Section 301, 47 U.S.C. § 301, of the Communications Act of 1934, as amended, (the Act). For the reasons noted below, the Bureau reduces the monetary forfeiture to $1,600.

II. BACKGROUND

2. On October 19, 1992 , the Anchorage Office issued a Notice of Apparent Liability (NAL) to Gary H. Anderson. The penalty was imposed for unauthorized operation on frequency 4242.0 kHz on board the vessel Janet Lynne, WYQ7080. Based on the response from Gary H. Anderson, the Anchorage Office issued a Notice of Forfeiture (NOF) for $2,000 on December 22, 1992. Gary H. Anderson now appeals. The petitioner contends that the violation was not willful; that it was a first time offense; and that he cannot pay the forfeiture.

III. DISCUSSION AND CONCLUSION

3. The arguments raised in the Petition for Reconsideration have been thoroughly considered and are incorporated herein by reference. Upon review of the arguments raised in the petition, as well as review of the NAL and NOF, we find that the petitioner had not previously violated the Commission's Rules. Therefore, we will reduce the forfeiture accordingly.

4. Although the petitioner claims inability to pay the forfeiture, no documentation, such as tax returns or financial statements that were requested in the Notice of Apparent Liability, were submitted to support that claim. Accordingly, the forfeiture amount is not further reduced for this reason.

IV. ORDERING CLAUSES

5. IT IS ORDERED THAT, pursuant to Section 503(b) of the Act, 47 U.S.C. § 503(b), and Section 1.106 of the Rules, 47 C.F.R. § 1.106, the petition for reconsideration is GRANTED in part and DENIED in part.

6. IT IS FURTHER ORDERED that, pursuant to Section 1.80 of the Rules, 47 C.F.R. § 1.80, Gary H. Anderson must pay the forfeiture amount of One Thousand Six Hundred dollars ($1,600) within thirty (30) days of receipt of this Order. Payment may be made by check or money order payable to the Federal Communications Commission.[1] Please place NAL/Acct. No. 315AN0013 on the remittance and mail it to:

Federal Communications Commission
Post Office Box 73482
Chicago, Illinois 60673-7482

7. IT IS FURTHER ORDERED that a copy of this Order shall be sent to Gary H. Anderson.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Smith
Chief, Field Operations Bureau

[1] Requests for installment plans should be mailed to: Chief, Billings and Collections, Mail Stop 1110A2, 1919 M Street, N.W., Washington, D.C. 20554. Payment of the forfeiture in installments may be considered as a separate matter in accordance with Section 1.1914 of the Commission's Rules.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TN Technologies NAL/Acct No. 415HF0011
Division of
Thermo Instrument Controls, Inc.
Santa Fe, New Mexico

Liability for
Monetary Forfeiture

NOTICE OF APPARENT LIABILITY

Adopted: May 31, 1994; Released: June 14, 1994

By the Field Operations Bureau:

I. INTRODUCTION

1. This is a Notice of Apparent Liability for Monetary Forfeiture issued pursuant to Section 503(b) of the Communications Act of 1934, as amended (the Act), 47 U.S.C. §503(b), and 1.80 of the Commission's Rules, 47 C.F.R. § 1.80, to TN Technologies Division of Thermo Instrument Controls, Inc. (TN Technologies)[1] for violation of Section 302 of the Act, 47 U.S.C. § 302, and Section 2.803 of the Commission's Rules, 47 C.F.R. § 2.803.

2. The appropriate amount of forfeiture for this violation is $14,000.

II. BACKGROUND

3. The FCC Portland Office contacted TN Technologies on April 22, 1994, in response to an advertisement for fluid level detection devices offered by TN Technologies. TN Technologies confirmed to the Portland Office staff member that the devices in the advertisement used radar techniques to determine fluid levels and were, in fact, available for purchase. The price quoted ranged from $6,000 to $7,000. On May 2, 1994, TN Technologies offered the unapproved devices for sale to the staff member by providing a brochure, through the US Postal Service, that listed, among other things, the CB-1220 and CB-1420 level-detection devices. Radar fluid level detection devices have been found by the Commission to require FCC equipment authorization. The devices were being advertised and offered for sale without the required equipment authorization.

III. DISCUSSION

4. By letter of April 2, 1993, and by a Notice of Apparent Liability released November 2, 1993, TN Technologies was formally advised that radar fluid level detection devices that it marketed, *i.e.* the CannonBear 1220 and the CannonBear 1420, required equipment authorization and could not be legally marketed without such authorization. Throughout subsequent discussions with TN Technologies, the Commission has consistently held that a specific authorization issued by the Commission is required for this type of device. Despite these consistent findings by the Commission, TN Technologies has continued to market the unapproved radar fluid level detection devices.

IV. CONCLUSION

5. Pursuant to Section 503(b) of the Act and the Commission's policy for assessing forfeitures, *see 1993 Policy Statement, Standards for Assessing Forfeitures*, 8 FCC Rcd 6215 (1993) (*Policy Statement*), the base forfeiture amount for marketing devices in violation of Commission equipment authorization requirements under Section 2.803 of the Rules is $7,000. Since this is the second occurrence of the violation, the amount is adjusted upward to $14,000.

V. ORDERING CLAUSES

6. Accordingly, pursuant to Section 503(b) of the Communications Act, and Section 1.80 of the Commission's Rules, IT IS ORDERED, that TN Technologies Division of Thermo Instrument Controls, Inc., IS APPARENTLY LIABLE FOR A MONETARY FORFEITURE in the amount of fourteen thousand dollars ($14,000) for willful violation of Section 302 of the Communications Act, 47 U.S.C. § 302, and Section 2.803 of the Commission's Rules, 47 C.F.R. § 2.803.

7. IT IS FURTHER ORDERED, pursuant to Section 1.80(f)(3) of the Commission's Rules, that TN Technologies shall, within 30 days of release of this Notice pay the full amount of the forfeiture or file a written response showing why the forfeiture should be reduced or not imposed. Any statements regarding inability to pay must be supported by appropriate documentation.[2] Send written responses regarding why the forfeiture should be reduced or not imposed to:

Federal Communications Commission
Field Operations Bureau
Enforcement Division, RM 744
1919 M Street, N.W., Mail Stop AC/1500E3
Washington, D.C. 20554
Attn: NAL Acct. No. 415HF0011

Forfeitures shall be paid by check or money order made payable to the Federal Communications Commission. The remittance should be market "Acct. No. 415HF0011" and mailed to the following address:

[1] The party was formerly known as TN Technologies, Inc.
[2] Claims of inability to pay should be supported by tax returns or other financial statements for the most recent three years.

Federal Communications Commission
Post Office Box 73482
Chicago, Illinois 60673-7482

8. IT IS FURTHER ORDERED that this notice shall be sent, by certified mail, return-receipt requested, to TN Technologies Division of Thermo Instrument Controls, Inc., and its attorneys.

FEDERAL COMMUNICATIONS COMMISSION

Lauren J. Belvin
Chief, Enforcement Division

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Maritime Radio Station WAP8267 — NAL/Acct. No.: 315PS0001

Hugh Mac Towing Corporation
Kenner, Louisiana

ORDER

Adopted: June 1, 1994; Released: June 14, 1994

By the Chief, Field Operations Bureau:

I. INTRODUCTION

1. Hugh Mac Towing Corporation (Petitioner) filed a Petition for Reconsideration, requesting reconsideration of the monetary forfeiture of $12,000 issued pursuant to Section 503, 47 U.S.C. §503, for willful violation of Section 301 of the Communications Act of 1934, as amended, (the Act), 47 U.S.C. §301, and repeated violation of Section 1.89 of the Commission's Rules, 47 C.F.R. §1.89, for failing to respond to Commission correspondence. For the reasons noted below, the Bureau reduces the monetary forfeiture amount to $6,400.

II. BACKGROUND

2. On October 22, 1992, the Powder Springs Field Office issued a Notice of Apparent Liability (NAL) to Petitioner. The penalty was imposed for willfully and repeatedly operating on an unauthorized frequency. Based on the response from Petitioner, the Powder Springs Field Office issued a Notice of Forfeiture for $12,000 on November 6, 1992. Petitioner now appeals. The Petitioner contends, "The Commission did not make out a *prima facie* case that Hugh Mac made the transmissions...; that Hugh Mac's conduct was neither willful nor repeated...; that Hugh Mac had been in business for less than three years, ... supplied the financial records which it could; and, the Commission did not take into account Hugh Mac's history of overall compliance."

III. DISCUSSION AND CONCLUSION

3. The arguments raised in the Summary of the Filing of the Petition for Reconsideration have been thoroughly considered and are incorporated herein by reference. Review of these arguments raised in the petition, as well as review of the NAL and NOF, reveals that Petitioner is entitled to a downward adjustment. The base amounts for each of these violations were reduced since the issuance of this forfeiture. *See 1993 Policy Statement, Standards for Assessing Forfeitures*, 8 FCC Rcd 6215 (1993). Additionally, a further adjustment for history of overall compliance is warranted. Thus, the forfeiture amount will be reduced to $6,400.

4. However, the petitioner claims that it cannot pay the forfeiture and submitted financial information in support of this contention. The financial information does not support this contention and we affirm the forfeiture amount accordingly.

5. As to Petitioner's allegation that the Commission did not make out a *prima facie* case that Hugh Mac made the transmission, the Commission does not rely solely on on-site investigations as the petitioner contends. The Commission can verify unauthorized operation through other investigative techniques such as monitoring and direction finding. Thus, based on techniques other than an on-site investigation, the FCC inspectors observed the operators aboard the vessels JOHN H MCMILLIAN and CHRIS MCMILLIAN communicating on 8294.0 kHz, for which Petitioner has no authorization issued by the Commission. Additionally, the stations were properly identified by call sign during transmissions. Moreover, both the Notice of Violation and Notice of Apparent Liability indicate that the petitioner operated on 8294.0 kHz, and petitioner was given proper notice of the violation under the Act and Rules. Lastly, we find the remaining contentions without merit.

IV. ORDERING CLAUSES

6. IT IS ORDERED THAT, pursuant to Section 503(b) of the Act, 47 U.S.C. §503(b), and Section 1.106 of the Rules, 47 C.F.R. §1.106, the petition for reconsideration is GRANTED in part and DENIED in all other respects.

7. IT IS FURTHER ORDERED, pursuant to Sectin 1.80 of the Rules, 47 C.F.R. § 1.80, that Hugh Mac Towing Corporation must pay the forfeiture amount of six thousand four hundred dollars ($6,400) within thirty (30) days of receipt of this Order. Payment may be made by check or money order payable to the Federal Communications Commission.[1] Please place NAL/Acct. No. 315PS0001 on the remittance and mail it to:

Federal Communications Commission
Post Office Box 73482
Chicago, Illinois 60673-7482

8. IT IS FURTHER ORDERED that a copy of this Order shall be sent by certified mail, return-receipt requested, to Hugh Mac Towing Corporation and counsel.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Smith
Chief, Field Operations Bureau

[1] Requests for installment plans should be mailed to: Chief, Billings and Collections, Mail Stop 1110A2, 1919 M Street, N.W., Washington, D.C. 20554. Payment of the forfeiture in installments may be considered as a separate matter in accordance with Section 1.1914 of the Commission's Rules.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

ACI Micro NAL/Acct. No. 215DV0070
Colorado Springs, Co

ORDER

Adopted: June 1, 1994; Released: June 14, 1994

By the Chief, Field Operations Bureau:

I. INTRODUCTION

1. ACI Micro (ACI) filed a Petition for Reconsideration, requesting reconsideration of the monetary forfeiture of $10,000 issued pursuant to Section 503(b), 47 U.S.C. §503(b), for willful violation of Section 302(b) of the Communications Act of 1934, as amended, (the Act), and Section 2.803 of the Commission's Rules, 47 C.F.R. §2.803. For the reasons noted below, the Bureau affirms the monetary forfeiture.

II. BACKGROUND

2. On August 17, 1992, the Commission's Denver Office issued a Notice of Apparent Liability (NAL) to ACI. The penalty was imposed for offering for sale computers that had not been certified as required by Section 15.101 of the Commission's Rules, 47 C.F.R. §15.101. Based on the response from ACI, the Denver Office issued a Notice of Forfeiture (NOF) for $10,000 on September 16, 1992. ACI now appeals. The petitioner, by letter dated April 23, 1993, requests reconsideration of his case but made no arguments.

III. DISCUSSION AND CONCLUSION

3. We find, upon review of the NAL and NOF, and based upon petitioner failing to present any arguments or evidence that was not previously addressed, we must affirm the forfeiture amount.

IV. ORDERING CLAUSES

4. IT IS ORDERED THAT, pursuant to Section 503(b) of the Act, 47 U.S.C. §503(b), and Section 1.106 of the Rules, 47 C.F.R. §1.106, the petition for reconsideration is DENIED.

5. IT IS FURTHER ORDERED THAT, pursuant to Section 1.80 of the Rules, 47 C.F.R. §1.80, ACI Micro must pay the forfeiture amount of ten thousand dollars ($10,000) within thirty (30) days of receipt of this Order. Payment may be made by check or money order payable to the Federal Communications Commission.[1] Please place NAL/Acct. No. 215DV0070 on the remittance and mail it to:

Federal Communications Commission
Post Office Box 73482
Chicago, Illinois 60673-7482

6. IT IS FURTHER ORDERED that a copy of this Order shall be sent to ACI and counsel.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Smith
Chief, Field Operations Bureau

[1] Requests for installment plans should be mailed to: Chief, Billings and Collections, Mail Stop 1110A2, 1919 M Street, N.W., Washington, D.C. 20554. Payment of the forfeiture in installments may be considered as a separate matter in accordance with Section 1.1914 of the Commission's Rules.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Seabreeze Parasail NAL/Acct. No.: 215HL0007
Honolulu, HI 96825

ORDER

Adopted: June 1, 1994; Released: June 14, 1994

By the Chief, Field Operations Bureau:

I. INTRODUCTION

1. Seabreeze Parasail (Seabreeze) filed a Petition for Reconsideration, requesting reconsideration of the monetary forfeiture of $2,000 issued pursuant to Section 503, 47 U.S.C. § 503, for violation of Section 301 of the Communications Act of 1934, as amended, (the Act), 47 U.S.C. §301. For the reasons noted below, the Bureau affirms the monetary forfeiture.

II. BACKGROUND

2. On July 21, 1992, the Honolulu Field Office issued a Notice of Apparent Liability (NAL) to Seabreeze. The penalty was imposed for operating a radio station on 156.925 MHz with no authorization issued by the Commission. Based on the response from Seabreeze, the Honolulu Field Office issued a Notice of Forfeiture (NOF) for $2,000 on August 24, 1992. Seabreeze now appeals. The petitioner contends that, to save money, it purchased less expensive VHF radios to replace radios for which it had a license to communicate from its office to its parasail boat. Seabreeze did not have a Commission license for these VHF radios. Petitioner also requests waiver of the forfeiture due to lack of funds.

III. DISCUSSION AND CONCLUSION

3. The arguments raised in Seabreeze's letter, undated and considered herein as a Petition for Reconsideration, have been thoroughly considered and are incorporated herein by reference. Upon review of these arguments raised in the petition as well as review of the NAL and NOF, we find that the petitioner fails to present any new arguments or evidence that was not previously addressed.

4. Although the petitioner claims inability to pay the forfeiture, no documentation, such as tax returns or financial statements that were requested in the Notice of Apparent Liability, were submitted to support this claim. A downward adjustment for prior history of compliance with Commission rules has already been made accordingly. Thus, the forfeiture amount is affirmed.

IV. ORDERING CLAUSES

5. IT IS ORDERED THAT, pursuant to Section 503(b) of the Act, 47 U.S.C. § 503(b), and Section 1.106 of the Rules, 47 C.F.R. § 1.106, the petition for reconsideration is DENIED.

6. IT IS FURTHER ORDERED that Seabreeze must pay the forfeiture amount of Two Thousand Dollars ($2,000) within thirty (30) days of receipt of this Order. Payment may be made by check or money order payable to the Federal Communications Commission.[1] Please place NAL/Acct. No. 215HL0007 on the remittance and mail it to:

Federal Communications Commission
Post Office Box 73482
Chicago, Illinois 60673-7482

7. IT IS FURTHER ORDERED that a copy of this Order shall be sent to Seabreeze Parasail.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Smith
Chief, Field Operations Bureau

[1] Requests for installment plans should be mailed to: Chief, Billings and Collections, Mail Stop 1110A2, 1919 M Street, N.W., Washington, D.C. 20554. Payment of the forfeiture in installments may be considered as a separate matter in accordance with Section 1.1914 of the Commission's Rules.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 91-141

In the Matter of

Expanded Interconnection with
Local Telephone Company Facilities — Transport Phase II

THIRD REPORT AND ORDER

Adopted: May 19, 1994; **Released: May 27, 1994**

By the Commission: Commissioner Barrett issuing a statement.

TABLE OF CONTENTS

	Paragraph
I. INTRODUCTION	1
II. BACKGROUND	4
III. REQUIREMENT TO PROVIDE SIGNALLING INFORMATION	7
A. Notice	7
B. Positions of the Parties	9
1. General Benefits and Costs	9
2. Technical Requirements and Network Modifications	14
3. Billing	20
C. Discussion	24
IV. COLLOCATION	32
V. PRICING ISSUES	36
A. LEC Charges for Signalling Services	36
1. *Notice* and Background	36
2. Positions of the Parties	37
3. Discussion	43
B. Recovery of Support Flows	47
C. ONA Framework	51
VI. TARIFFING AND IMPLEMENTATION	56
VII. LEC PRICING FLEXIBILITY	58
VIII. OTHER ISSUES	65
A. Reciprocity	65
B. Jurisdictional Measurement and Reporting	67
C. Separations Issues	72
IX. CONCLUSION	75
X. REGULATORY FLEXIBILITY ACT	76
XI. ORDERING CLAUSES	77

I. INTRODUCTION

1. In this order, we require Tier 1 local exchange carriers (LECs) (except members of the National Exchange Carrier Association (NECA)) to provide to interested third parties, including competitive access providers (CAPs), interexchange carriers, (IXCs), and end users, signalling information necessary to provide tandem switching. These parties will thus, for the first time, be able to carry traffic of multiple IXCs from LEC end offices to their own tandems, switch traffic at that point, and deliver the traffic to the appropriate IXC.

2. This measure represents another step in a series of efforts to remove barriers to competition in interstate access services.[1] Our earlier orders opened the door to competition in special access and switched transport transmission services. Interconnectors, however, had to rely on LECs to perform the switching functions necessary to provide switched transport. The steps we now take will enable interconnectors, as well as other parties, to provide tandem switching functions for switched transport services. Thus, these measures will open the door to third parties to provide competitive tandem-switching services. By further reducing barriers to competition in switched access services, our actions will benefit all users of tandem switching, especially small IXCs that tend to rely heavily on tandem-switched transport, who will benefit from more competitively priced tandem switching services. Our actions also should promote more efficient use and deployment of the country's telecommunications networks, encourage technological innovation, and exert downward pressure on access charges and long-distance rates, all of which should contribute to economic growth and the creation of new job opportunities. In addition, these measures should increase access to diverse facilities, which could improve network reliability.

3. As discussed in more detail below, we require Tier 1 LECs (except NECA members) to provide signalling information necessary for tandem switching from LEC equal access end offices to any interested third party (hereinafter sometimes referred to as "tandem switching providers" or "TSPs").[2] In end offices in which common channel signalling (CCS or SS7) is available, TSPs shall have the option of receiving signalling information via SS7 or multifrequency (MF) signalling. The provision of this informa-

[1] In previous orders, we have required LECs to provide expanded interconnection for interstate special access and switched transport services. Expanded Interconnection with Local Telephone Company Facilities, Report and Order and Notice of Proposed Rulemaking, 7 FCC Rcd 7369 (1992) (*Special Access Expanded Interconnection Order*), *appeal pending sub nom. Bell Atlantic v. FCC*, No. 92-1619 (D.C. Cir., filed Nov. 25, 1992), *recon.*, 8 FCC Rcd 127 (1992), *recon.*, 8 FCC Rcd 7341 (1993); Expanded Interconnection with Local Telephone Company Facilities, Second Report and Order and Third Notice of Proposed Rulemaking, 8 FCC Rcd 7374 (1993) (*Switched Transport Expanded Interconnection Order*), *appeal pending sub nom. Bell Atlantic v. FCC*, No. 93-1743 (D.C.) Cir., filed Nov. 12, 1993).

[2] Tier 1 LECs are those with $100 million or more in annual regulated revenues for a sustained period of time. Commission Requirements for Cost Support Material to be Filed with 1990 Annual Access Tariffs, 5 FCC Rcd 1364 (1990).

tion will be treated as a new service under our price caps regime, and Tier 1 LECs must file tariff amendments to reflect the availability of signalling information from LEC equal access end offices within ninety days of publication of this order in the Federal Register. Based on the record and in light of our prior decisions on pricing flexibility in the *Switched Transport Expanded Interconnection Order* and in the *Transport* proceeding,[3] we do not grant LECs additional pricing flexibility in this order. We also find that the transport interconnection charge is sufficient to protect support flows potentially affected by the provision of signalling information.

II. BACKGROUND

4. The Commission has taken several initiatives to increase competition in the long-distance access market. First, in 1992, in the *Special Access Expanded Interconnection Order*, we required Tier 1 LECs, except NECA pool members, to provide expanded interconnection for interstate special access to all interested parties.[4] In 1993, we adopted the *Switched Transport Expanded Interconnection Order*, in which we required LECs providing expanded interconnection for special access to provide expanded interconnection for switched transport service as well.[5] In that order, we opened the opportunity for interconnectors to provide alternative transmission services to LEC-provided direct-trunked transport and entrance facilities by collocating transmission facilities in LEC end offices, tandems, serving wire centers (SWCs), and certain remote nodes.[6] As a result of those two actions, interconnectors now are able to provide special access and switched transport transmission services in competition with the LECs.

5. Only LECs, however, currently can provide tandem switching functions. Third parties cannot now provide such functions because they generally do not have access to the signalling information necessary to switch and route traffic to IXCs. Thus, virtually all tandem-switched transport currently must be routed through LEC tandems and switched by the LECs at that point; interconnectors can provide only the link between the LEC tandem and the IXC point-of-presence (POP).

6. In a Second Notice of Proposed Rulemaking (*Notice*), which is the subject of this proceeding, we proposed to broaden the scope of our access initiatives to address this limitation.[7] Specifically, we proposed to require LECs to provide other parties access to LEC signalling information to enable such parties to offer tandem switching functions.[8] Under this proposal, interconnectors would be able to offer tandem-switched transport, using their own tandems, in competition with the LECs. In addition, third parties, such as IXCs, could obtain economies by aggregating their traffic from end offices on a single direct trunk, routing that traffic to a third-party tandem, and switching it at that point. We address this proposal below.

III. REQUIREMENT TO PROVIDE SIGNALLING INFORMATION

A. Notice

7. In the *Notice*, we proposed to require LECs to provide third parties with access to the signalling features and functions within LEC networks necessary to create switched access networks that compete with the LECs.[9] We tentatively concluded that the public interest benefits of this proposal would be substantial and would outweigh any potential detriments.[10] We noted that the proposal would provide greater service choices for telecommunications users, especially small IXCs, heighten incentives for efficiency, including efficiency in aggregating interexchange traffic, accelerate technological innovation, and lower rates for switched access services.[11] We stated further that our proposal should help ensure that the pricing relationships between tandem-switched and direct-trunked transport are based on market realities, which should reduce or perhaps eliminate the need to rely on regulatory safeguards.[12] We also noted that because interconnectors or their customers would pay the transport interconnection charge, our measures should not impose significant additional pressure on support flows reflected in LEC rates.[13] We asked for comment on our tentative conclusions and on whether third-party access to LEC signalling information would affect public switched network reliability.[14]

---

[3] *See infra* ¶ ¶ 58-64 (pricing flexibility section).

[4] *Special Access Expanded Interconnection Order*, 7 FCC Rcd 7369.

[5] *Switched Transport Expanded Interconnection Order*, 8 FCC Rcd 7374. Interstate switched transport connects LEC end offices with IXC points of presence (POPs) for long-distance calling. There are several types of transport services and facilities. "Entrance facilities" are used to transmit traffic between an IXC's POP and the LEC office serving that POP, called a serving wire center (SWC). Direct-trunked transport facilities are used to transmit traffic between a LEC SWC and end office (or between any two customer-designated LEC offices) when such traffic requires no tandem switching. Tandem-switched transport facilities are used to transmit traffic between the LEC end office and SWC (or tandem) when such traffic requires tandem switching. Dedicated signalling transport is transport between IXCs' SS7 networks and LEC signalling transfer points (STPs). *See* Transport Rate Structure and Pricing, Second Report and Order, 9 FCC Rcd 615, 618 n.7 (1994) (*Baskets and Bands Order*).

[6] *Switched Transport Expanded Interconnection Order*, 8 FCC Rcd at 7407-7409, ¶ ¶ 53-57.

[7] Expanded Interconnection with Local Telephone Company Facilities, Second Notice of Proposed Rulemaking, 7 FCC Rcd 7740, 7747, ¶ 40 (*Notice*).

[8] *Id.* We declined to address expanded interconnection for provision of subscriber loops, as well as interoperability of LEC local switches and other parties' switches required for competitive provision of local exchange service. *Id.* at 7748 n.48.

[9] *Id.* at 7748, ¶ 45.

[10] *Id.* at 7747, ¶ 42.

[11] *Id.* at ¶ 41.

[12] *Id.*

[13] *Id.* In addition to inviting parties to comment on our proposal, we solicited comments on whether there are other features or functions to which LECs should provide access. We also asked whether there are any relevant differences between the benefits of switched transport interconnection and those arising from our signalling information proposal. *Id.* at ¶ ¶ 42 & 46.

[14] In the *Notice*, we also sought comment on a proposal by the Independent Data Communications Manufacturers Association, Inc. (IDCMA) to allow third parties to collocate customer equipment in LEC offices. *Notice*, 7 FCC Rcd at 7748, ¶ 49. This order does not address the IDCMA proposal; we will address it at a later time.

8. The *Notice* proposed that third parties receive access to MF and SS7 signalling from both LEC end offices and tandem switches.[15] Although the *Notice* did not detail how such arrangements would work, we contemplated that TSPs would use either their own collocated facilities or LEC facilities to carry traffic from the LEC end office to their own tandems. We also contemplated that if a TSP sought interconnection at the LEC tandem, rather than the end office, the LEC would provide tandem-switched transport for the originating traffic from its end office to its tandem. From there, either the interconnector (if collocated) or the LEC (if the TSP were not collocated) would transport the traffic to the TSP tandem. In either case, the TSP would switch the traffic at its tandem and transport it to the appropriate IXC over its own direct-routed facilities.

B. Positions of the Parties

1. General Benefits and Costs

9. CAPs, IXCs, and users applaud our proposal to require LECs to provide access to LEC signalling information.[16] These parties generally base their support on some or all of the benefits identified in the *Notice*. MFS and CompTel contend that competitive tandem switching would allow interconnectors to serve lower-volume transport routes economically, to the benefit of small IXCs, their customers, and, according to MFS, residents of rural areas.[17] Similarly, ALTS, ITN, and GSA assert that the proposal would extend to a larger, more diverse universe of users the benefits of increased competition, including increased choice, improved technology, and lower rates.[18] ALTS also contends that by enlarging the compass of the market in which competitive service may be offered, conditions conducive to increased investment and new market entry may be established. Citing similar benefits, AT&T asserts that access to LEC signalling information used for call set-up functions is indispensable to providing switched transport by interconnectors.[19] Likewise, Prodigy maintains that absent access to signalling data, interconnectors will be "consigned to second class status" and that the proposal is valuable to information service providers like Prodigy with national networks, which can utilize CAPs to concentrate their traffic into local nodes.[20] In addition, Ad Hoc, MCI, and ALTS argue that interconnector access to signalling information will yield greater route diversity and network redundancy.[21] Finally, Time Warner claims that access to LEC signalling information will facilitate its development of the world's first commercial "Full Service Network," which it describes as an electronic superhighway with switched, broadband, analog, and digital network platforms capable of supporting a wide range of entertainment, educational and telecommunications services.[22]

10. LEC positions on the signalling proposal vary. Some generally support it;[23] some flatly oppose it.[24] Others fall somewhere in between.[25] In support, Ameritech argues that interconnector access to carrier signalling information will widen competitive opportunities for alternative providers of switched transport service and thereby create a more comprehensive form of switched transport competition. Ameritech asserts that this measure is consistent with its comprehensive proposal to unbundle fully its network.[26] Rochester delineates the pro-competitive benefits of making signalling information available to third parties and states that it may do so prior to a Commission mandate.[27] GTE agrees that promoting the availability of competitive tandem-switched services "is a worthwhile goal so long as a reasonable balance is maintained between the costs and benefits" involved.[28] GTE maintains, however, that providing signalling information to interconnectors should not be

---

[15] *Id.*

[16] *E.g.*, AT&T Comments at 1-3; MCI Comments at 2-3; CompTel Comments at 1-2; ALTS Comments at 2-4; MFS Comments at 8-10; Teleport Comments at 1; Teleport Denver Comments at 4-5; WilTel Comments at 1-2; Ad Hoc Comments at 3-5; IIA Comments at 2-3; GSA Comments at 2-4; Prodigy Comments at 1-4; ITN Reply at 2.

A list of parties filing comments and replies is provided in Appendix A.

[17] MFS Comments at 8-9; CompTel Comments at 2. CompTel, however, asserts that contrary to the suggestion in the *Notice*, tandem competition is not likely to reach a level to warrant eliminating regulation. CompTel Comments at 3. *Accord* WilTel Comments at 1-3 (arguing that tandem competition cannot substitute for Commission regulation). ALTS, on the other hand, claims that once effective competition is fully achieved and pricing relationships among various access services function according to market conditions rather than regulation, there will be less need to rely on artificial safeguards. ALTS Comments at 3-4.

[18] ALTS Comments at 3; ITN Reply at 2; GSA Comments at 2-3.

[19] AT&T Comments at 2.

[20] Prodigy Comments at 1 & 2-3 n.3. *See also* IIA Comments at 2 (asserting that by allowing non-LEC service providers to offer tandem-switching functions, the Commission can facilitate the creation of a "network of networks" in which service providers autonomously control delivery of their products).

[21] ALTS Comments at 3; Ad Hoc Comments at 5; MCI Comments at 3.

[22] According to Time Warner, these Full Service Networks will offer new and innovative video and voice services, as well as basic telecommunications services, such as access services. Time Warner states that, as planned, these networks would provide connectivity with a wide range of content providers, IXCs, enhanced service providers and users. Time Warner asserts that the availability of LEC signalling information would facilitate such connectivity and promote greater diversity and utility of Full Service Network Offerings. Time Warner Comments at 1-4.

[23] Ameritech Comments at 1-2; GTE Comments at 2-5; Rochester Comments at 2.

[24] *E.g.*, Bell Atlantic Reply at 3; U S West Reply at 1-7 & 13; Pacific Comments at 1-2, Reply at 1-17.

[25] *E.g.*, BellSouth Comments at 1-3, Reply at 1; Southwestern Bell Comments at 1-4 & 23-24, Reply at 1-6 & 16-17. *See also* USTA Comments at 1-3 & 15, Reply at 1-2 & 16.

[26] Ameritech Comments at 2-3 & n.3 citing "Petition for Declaratory Ruling and Related Waivers to Establish A New Regulatory Model for the Ameritech Region" (filed March 1, 1993).

[27] Rochester Comments at 2-3. Subsequent to filing its pleadings, Rochester filed a petition for waiver of various Part 61 and 69 rules in order to implement its "Open Market Plan." This plan is similar in its general intent to the Ameritech petition and is currently pending. *See* "Rochester Telephone Corp. Petition for Waiver of Part 61 and Part 69 to Implement Open Market Plan" (filed May 19, 1993).

[28] GTE Comments at 2.

viewed as a prerequisite for effective market pressure on LEC tandem-switched services. It asserts that a number of close substitutes for such services already exist.[29]

11. NYNEX and United urge the Commission to proceed cautiously.[30] NYNEX proposes various methods by which access to LEC signalling information by interconnectors could be accomplished, while urging us to study carefully the technical limitations of each.[31] United states that it does not object to the concept that LEC signalling may be passed to interconnectors, but maintains that the benefits of competitive tandem switching may not outweigh the costs.[32] United alleges that providing interconnectors signalling information will require potentially expensive switching and billing modifications, which could increase cost to customers and delay call processing.[33]

12. USTA alleges that the technical issues are formidable, demand is lacking, significant investment will be required, and competitors are unwilling to pay for the signalling information.[34] For these reasons, USTA encourages the Commission to "move forward only when it can document a clear net benefit that will be equitably available . . . and that will be sufficient in magnitude to offset the costs."[35] Southwestern Bell opposes the signalling proposal, unless "all of the unlawful and detrimental" aspects of the *Special Access and Switched Transport Expanded Interconnection Orders* are rectified. LECs are granted sufficient cost recovery and increased pricing flexibility, and certain other requirements are satisfied.[36]

13. Bell Atlantic, Pacific, and U S West argue that LECs should not be required to develop and deploy unbundled tandem signalling because the four conditions precedent to offering Basic Service Elements (BSEs) -- technical feasibility, economic feasibility, expected market demand, and utility -- have not been satisfied.[37] Noting assertions by WilTel and CompTel that competitive tandems will rarely be deployed, Pacific and U S West argue that the parties have not demonstrated the utility of signalling services, or the demand for those services.[38] Indeed, U S West characterizes our proposal as a "theoretical exercise" and claims that parties requesting signalling unbundling do so not because they intend to use such information, but rather to provide some kind of "theoretical check" on LEC pricing policies and practices.[39] Pacific also claims that the tandem switching proposal would impede broader network efficiency.[40]

2. Technical Requirements and Network Modifications

14. The record identifies four types of signalling information used to provide switched transport: (1) the Carrier Identification Code (CIC), which identifies the caller's selected IXC; (2) the OZZ, (which indicates the specific IXC trunk group that is to carry the call;)[41] (3) the Automatic Number Identification (ANI), which identifies the billed number; and (4) the Called Number Identification (CNI), which identifies the called telephone number.[42] Currently, LECs transmit ANI and CNI to their access customers on originating Feature Group D trunks from LEC end offices and tandems. They do not, however, transmit the CIC and OZZ codes to third parties because IXCs do not need this information to route and bill calls. Thus, these latter codes are dropped by the LECs from the signalling data stream after trunk selection has taken place. In the case of direct-trunked traffic, the CIC and OZZ codes are dropped at the originating end office; in the case of tandem-switched traffic, they are dropped at the tandem. Because the CIC and OZZ codes are needed for tandem switching and are not currently provided to third parties, these data are the focus of this proceeding.[43]

15. Most parties agree that it would be relatively easy for LECs to provide third parties with the CIC and OZZ codes from LEC end offices via MF or SS7 signalling. Several commenters claim that only a change in end office routing tables would be necessary.[44] They maintain that LECs would simply have to perform end office translations that

---

[29] GTE Comments at 2-3. GTE claims, for example, that if a LEC increases the price of tandem-switched transport, an IXC can simply use dedicated transport instead of tandem-switched transport and order direct trunks -- from either a LEC or an alternative carrier. *Id.* at 3. GTE also contends that demand for tandem-switched transport will come from larger (rather than smaller) IXCs, which may select tandem-switched transport to carry their traffic that overflows from direct trunks. *Id.*

[30] NYNEX Comments at 3 & 18-19; United Comments at 3-7;

[31] NYNEX Comments at 3.

[32] United Comments at 2 & 4.

[33] *Id.* at 4.

[34] USTA Reply at 1-13. USTA claims that "*no* party in the proceeding has expressed *any* intention to use and pay for Phase II services." USTA Reply at 8 (emphasis in original). *See also* Bell Atlantic Comments at 1-4, Reply at 2-3; USTA Reply at 7-8. BellSouth "is in substantial agreement with" USTA's Comments and requests that the Commission proceed as outlined by USTA. BellSouth Comments at 3.

[35] USTA Reply at 16.

[36] Southwestern Bell Comments at 1-4.

[37] Bell Atlantic Reply at 2-3; Pacific Reply at 3-10; U S West Reply at 2-7. Bell Atlantic, however, maintains that the Commission should not impose BSE regulatory requirements on the provision of signalling information.

[38] Pacific Reply at 3-10; U S West Reply at 2-7. Pacific also asserts in its Reply that signalling services are not technically feasible and would be extremely costly. As discussed *infra*, however, Pacific subsequently filed an *ex parte* letter acknowledging this assertion to be erroneous with respect to signalling information provided from LEC end offices. *See infra* n.44.

[39] U S West Reply at 1-6.

[40] Pacific Comments at 1.

[41] IXCs may use different trunk groups to carry different classes of calls. For example, 0+ calls may be carried on a different trunk group than direct-dialed domestic calls. The OZZ digits indicate the call type, and thus the trunk group, onto which a particular call should be routed. *See* Pacific Comments at A-2.

[42] USTA Comments at 4; US West Comments at 9-10; NYNEX Comments at 5. For terminating traffic, the called telephone number, which the IXC provides, conveys the necessary information to route a call from the IXC to the terminating end office. MFS Comments at 6-7. The first six digits of the ten-digit number identify the end office that serves the called telephone number. *Id.*

[43] MCI argues that "each and every signalling feature and function" used by the LECs must be made available to interconnectors. MCI Comments at 2-3. According to MCI, these would include, but not be limited to, all protocols relating to the origination, termination, routing, measurement, network administration, and billing of switched traffic. *Id.* at 3. MCI does not, however, identify these protocols with any greater specificity, and parties do not address the implications of this proposal. Therefore, the record here provides no basis for considering this degree of unbundling.

[44] Letter from Dee May, Director Regulatory Issues, NYNEX to

have the effect of treating a third-party tandem, as though it were a LEC tandem.[45] Parties addressing the cost of such a change maintain that it would be minimal and equivalent to the cost of conventional routing table changes that LECs make on a regular basis.[46] Some parties, however, contend, that because industry standards do not contemplate transmission of CIC and OZZ codes over Feature Group D, the proposal would require action by Committee T.1 of the Exchange Carrier Standards Association. MFS argues that since the costs are minor, LECs should be required to provide the CIC and OZZ from end offices within a reasonably short time.[47]

16. Most parties also agree that providing signalling data at LEC tandems raises more difficult issues.[48] They claim that unlike the end office, which transmits CIC and OZZ codes to LEC tandems, LEC tandems need not transmit CIC and OZZ codes to any point inside or outside the LEC network. Consequently, they argue, because LEC tandems have not been equipped with the capability of transmitting these data, this information automatically "drops off" the data stream at the LEC tandem.[49] LECs generally agree that if they modified their tandem software, they could provide or "regenerate" the CIC and OZZ and transmit it to third-party tandems. Commenters' cost and timing estimates, however, vary considerably. For example, NYNEX claims that software changes would cost at least $1 million and take a minimum of two years to complete, while Pacific estimates they would cost $15-25 million and take two to four years to complete.[50] Southwestern Bell estimates that software upgrades and trunk conversion costs would be $12.3 million.[51]

17. Some LECs question whether these changes are warranted. They note that interconnectors can already collocate at LEC tandems and route traffic from those tandems to their own tandems provided that they use separate trunk groups for each IXC.[52] They question whether the drawbacks of using separate trunk groups warrant the costs of changing tandem software. Several LECs also question whether such two-tandem architectures are really feasible. They argue that because interconnectors would have to purchase LEC tandem-switched transport in order to receive calls that are routed through a LEC tandem, interconnectors could not offer a viable tandem-switched service using this architecture. In addition, they contend, because calls would have to pass through two tandems, calls would

---

Gary Phillips and Linda Haller, FCC (March 22, 1994) (NYNEX *Ex Parte)* at 1 (arguing that routing table changes would be required to send signalling information from a NYNEX end office to a third-party tandem); Letter from Jo Ann Goddard, Director Federal Regulatory Relations, Pacific, to William F. Caton, Acting Secretary, FCC (February 17, 1994) (First Pacific *Ex Parte)* at 1 (stating that Pacific's April 2, 1993 comments erroneously claimed that software program modifications would be required to transmit signalling from an end office to a CAP tandem; that "Pacific has since determined that no software changes . . . would be required:" and that only switch routing translations would be involved); Letter from Jo Ann Goddard, Director Federal Regulatory Relations, Pacific, to William F. Caton, Acting Secretary, FCC (March 23, 1994) (Second Pacific *Ex Parte).* Attachment at 1 (arguing that providing signalling from a Pacific end office to a CAP tandem "could be accomplished within a standard software translation interval of forty-five days"); Letter from Anthony M. Alessi, Director, Federal Relations, Ameritech, to William F. Caton, Acting Secretary, FCC (March 21, 1994) (Ameritech *Ex Parte)* at 1 (asserting that signalling information that is provided from an Ameritech end office to an Ameritech tandem could be provided to a third-party's tandem via a routing change); AT&T Reply at 7-8 n.15; United Comments at 5.

[45] First Pacific *Ex Parte* at 1 and Second Pacific *Ex Parte*, Attachment at 1 (arguing that Pacific could pass CIC and OZZ information by making switch routing or software translations); US West Comments at 10-11 (claiming that LECs could send the CIC and OZZ information to an interconnector tandem by "telling" the network that an interconnector tandem is a LEC tandem); GTE Comments at 7 (asserting that signalling information is available regardless of the identity of the owner of the tandem to which the equal access end office sends it); USTA Comments at 5 (contending that LECs may provide the CIC and OZZ by performing end office translations "which have the effect of treating a CAP access tandem as though it were a LEC access tandem"); NYNEX Comments at 11, n.10 (claiming that signalling information could be routed from LEC end office to interconnector tandem by "tricking" end office into believing that interconnector tandem is LEC tandem). *Accord* MFS Reply at 2 & 5.

[46] *See* Ameritech *Ex Parte* at 1 (arguing that "|c|hanging the routing of the traffic from Ameritech's tandem to another provider's tandem would be similar to a trunk rearrangement"); NYNEX *Ex Parte* at 1 (claiming that no new rate elements would be needed). U S West seems to acknowledge that the CIC and OZZ information could be provided to third parties relatively easily, but declines to quantify the costs of doing so. Rather, U S West contends that since there is no evidence of any current need for the information, there is no reason to quantify the costs of providing it. U S West Reply at 11. Other parties assert that providing signalling information to third-party tandems would be costly, though these parties do not appear to differentiate end office-provided signalling from tandem-provided signalling. *See* United Comments at 4. Some parties also cite cost estimates contained in Ameritech's Comments. *See* GTE Reply at 8; USTA Reply at 1. As indicated above, however, Ameritech itself in a subsequent *ex parte* contends that end-office generated signalling information would be similar to a simple trunk rearrangement. Ameritech *Ex Parte* at 1.

[47] MFS Reply at 2.

[48] *E.g.*, NYNEX Comments at 6-9 & Exhibit 2; Pacific Comments at A2-A4; GTE Comments at 8-10; Southwestern Bell Comments and 20-21; USTA Comments at 4-7; United Comments at 5-6.

[49] *E.g.*, NYNEX Comments at 7; United Comments at 5-6. NYNEX also claims that using either two tandems or a single interconnector tandem, LECs also would have to assign additional CIC codes to IXCs. NYNEX Comments at 8 & 11. According to NYNEX, assignment of multiple codes would be necessary to distinguish between an IXC's traffic to be routed to an interconnector from that to be routed by a LEC. *Id.* at 8. WilTel notes, however, that IXCs probably will not want to divide their traffic in a single end office between an interconnector and a LEC because dividing IXC traffic would decrease trunking efficiency for IXCs. WilTel Reply at 11. WilTel acknowledges that some IXCs may want to route their traffic to interconnectors and use LEC tandems for overflow, but argues that such a routing arrangement would not require assignment of multiple CICs. *Id.*

[50] NYNEX Comments at 7-8; Pacific Comments at A-3 to A-4. NYNEX bases its estimate on a cost of at least $50,000 per tandem switch, for a total of 23 tandems, and notes that the costs could be much higher. NYNEX Comments at 7-8.

[51] Letter from William A. Blase, Jr., Director Federal Regulatory, Southwestern Bell Corporation to William F. Caton, Acting Secretary, FCC (April 22, 1994) (Southwestern Bell *Ex Parte).* Attachment at 2-3. Southwestern Bell also suggests that additional CIC codes could require replacement of certain switches. *Id.* at 3. As noted, however, it does not appear that new CIC codes will be necessary. *See supra* n.48.

[52] *See, e.g.*, GTE Comments at 9.

be delayed.[53] LECs also note that because interconnectors would have to purchase LEC tandem-switched transport to receive calls from a LEC tandem, this architecture would not increase competition for LEC tandem-switched services. At the same time, LECs acknowledge that interconnectors may require the ability to receive signalling information from LEC tandems in order to provide tandem-switched 800 service.[54]

18. In reply, MFS denies that using separate trunks for each IXC is an adequate substitute for switching information. It asserts that while it would primarily rely on signalling information from LEC end offices, the availability of such information from tandems as well "could provide a useful adjunct to other forms of interconnection" to assure its ability to originate and terminate traffic ubiquitously.[55] Nevertheless, acknowledging that these modifications may be more extensive and expensive than end office changes, MFS claims that signalling information should be offered at LEC tandems only upon receipt of a *bona fide* request, and sufficient time should be allowed for development of the requisite software.[56] ALTS maintains that availability of signalling information from LEC tandems would allow interconnectors to route traffic from fewer end offices, and require less construction of links.[57]

19. A number of parties raise questions about the provision of signalling information via SS7 from LEC end offices and tandems. Several LECs argue that LECs should not be required to provide SS7 interconnection at their end offices and tandems, but rather, at their signalling transfer points (STPs).[58] They argue that only an STP has the capability to examine an SS7 signal to ensure that the signal is from an authorized source and that the SS7 messages conform to appropriate protocols. They assert that SS7 signals that are not subjected to these screening functions are more likely to cause network failures.[59] Therefore, they argue, if interconnectors can send messages directly to a LEC end office or tandem, LECs would have to recreate, in effect, their SS7 networks to equip end offices and tandems with the screening capabilities now performed by STPs. This, the LECs argue, would be enormously costly. LECs also argue that because STPs are capable of handling large volumes of traffic, it is more efficient to route SS7 signals through a few centralized STPs, rather than to install STP capabilities in every LEC switching office.[60] AT&T asserts that to facilitate use of CCS signalling by interconnectors, such signalling must be made available at LEC STPs. AT&T argues that it would be completely infeasible for interconnectors to build SS7 facilities to each LEC end office and that LECs should therefore be required to make it available at STPs as well as tandems and end offices.[61] In reply, ALTS agrees that interconnectors must have access to LEC STPs , but asserts that LECs should not be permitted "to artificially constrain the locations at which the features and functions are made available."[62]

3. Billing

20. Some LECs argue that use of interconnector tandems raises issues with respect to LEC billing of originating and terminating switched access charges.[63] LECs explain that originating usage normally is recorded at the originating end office upon receipt by the end office switch of trunk seizure acknowledgment from the IXC.[64] LECs assert that if interconnectors provide tandem-switched transport, originating usage recording should begin when the interconnector's tandem receives the call, rather than when the IXC switch receives the call. They also argue that the interconnector's tandem must be equipped to send a signal to the originating LEC indicating that the call has been received so that originating billing can begin.[65] LECs state that unless the interconnector tandem provides this signal, it would be impossible for the originating LEC to bill the appropriate usage sensitive charges.[66] LECs also claim that where an interconnector purchases LEC transport from a LEC end office to an interconnector's tandem switch, LECs would have to modify their billing procedures to charge that interconnector for the LEC-provided transport. They assert that current billing system parameters bill all calls with tandem signalling at tandem-switched transport rates.[67]

21. Terminating traffic, according to the LECs, poses more difficult billing problems. LECs assert that terminating billing for switched access traffic is recorded in the first LEC facility that receives the traffic -- which in the case of tandem-switched transport, is the LEC tandem.[68] LECs maintain that their end offices cannot record billing information for terminating tandem-switched transport because they have no way of identifying the amount to bill

---

[53] NYNEX Comments at 8-9.

[54] *E.g.*, Southwestern Bell Comments at 20; Pacific Comments at A-6; GTE Comments at 10; USTA Comments at 6. These LECs note that under the 800 database system, 800 calls originating in end offices that lack SS7 capabilities must be routed to a LEC tandem for IXC identification. Thus , the CIC and OZZ codes for such calls are not generated until after the call has been routed to a LEC tandem.

[55] MFS Reply at 4.

[56] *Id.* at 2-3.

[57] ALTS *Ex Parte*.

[58] GTE Comments at 16-17; Southwestern Bell Comments at 19; USTA Comments at 3-4.

[59] GTE Comments at 16. *See* BellSouth Comments at 2-3 (the Commission should ensure that any measures it adopts "give due regard to the future performance and security of LEC networks).

[60] GTE Comments at 16.

[61] AT&T Comments at 5.

[62] ALTS Reply at 6 & n.17.

[63] These charges include carrier common line, local switching, and if provided by the LEC, tandem switching.

[64] NYNEX Comments at 11; GTE Comments at 13. In an MF environment, the IXC sends what is commonly termed a "wink" to the originating LEC to confirm its receipt of the call and trigger originating access billing. With SS7 connections, the IXC transmits either an "initial address message" or "exit message" to the LEC, depending on the architecture.

[65] *Id.*

[66] These charges include the carrier common line charge and the local switching charge.

[67] *See, e.g.*, USTA Comments at 5; GTE Comments at 7 n.10; US West Comments at 11. USTA explains that without a modification, the LEC end office would create a billing record as if the traffic were routed on the LEC's, rather than an interconnector's network, and charge an interconnector tandem-switched interoffice transport and tandem-switching, rather than direct-trunked transport. USTA Comments at 5. USTA claims that LEC ability to make requisite modifications and the costs of such adjustments are unknown. *Id.*

[68] USTA Comments at 7; NYNEX Comments at 11-12 & n.10; Pacific Comments at A-7 to A-8.

each IXC after the traffic is loaded onto common facilities. They assert that if an interconnector is deemed the customer of record for terminating usage, this would pose no problems, as the LECs could simply bill the interconnector for all terminating usage.[69] LECs state, though, that if the LEC customer of record is an IXC that uses an interconnector tandem, special arrangements would have to be made.

22. LECs indicate that there would be three possible solutions to the terminating billing problem. First, LECs and interconnectors could modify their respective networks so that interconnectors could send and LECs could receive carrier identification information for calls terminating from an interconnector tandem.[70] Pacific estimates that it would cost $5-10 million and take three to five years for it to make this modification.[71] Second, LECs could bill IXCs based on data recorded at interconnector tandems and provided via usage tapes to LECs.[72] NYNEX claims that this approach would be satisfactory if the interconnector assumed liability for any discrepancy between LEC billing records and interconnector-provided tapes.[73] Ameritech, however, opposes this approach, claiming that it has been problematic when used in meet point billing situations.[74] Third, some parties suggest that interconnectors could construct dedicated IXC trunks from their tandems to LEC end offices.[75]

23. MFS strongly favors the second approach, though it opposes assuming liability for any discrepancy in LEC and interconnector records.[76] MFS argues that interconnectors and LECs should be considered "co-carriers" of switched access service and should follow the same "well-established" procedures governing the billing and division of revenues that apply when an end office operated by one LEC is "homed" to a tandem operated by another LEC.[77] MFS suggests that as co-carriers, both interconnectors and LECs would be required to comply with such "meet-point" billing procedures, unless the interconnector chooses not to be treated as a co-carrier, in which case the interconnector would be billed by the LEC as the LEC customer.[78] MFS also argues that requiring interconnectors to construct direct trunks from their tandems to LEC end offices would defeat the purpose of this proceeding, which is to enable interconnectors to provide tandem-switched service in lieu of direct trunks.[79]

C. Discussion

24. We now affirm our tentative conclusion that broader interconnection requirements to facilitate access competition are in the public interest. In accordance with this finding, we require Tier 1 LECs (except NECA pool members) to provide signalling information from equal access end offices so that third parties may install their own tandems to provide tandem-switching services. Third parties may collocate at LEC end offices and provide their own tandem-switched transport between those end offices and their tandems, or they may purchase LEC transport to their tandems. We do not require LECs to provide signalling information for tandem switching from their tandems since we find that the record does not support the establishment of such a requirement at this time.

25. We conclude that the availability to third parties of signalling information needed for tandem switching could provide significant public benefits. It would facilitate broader access competition by enabling interconnectors to offer competitive interstate tandem-switching and transport services. In addition, it would increase opportunities for small IXCs to gain economies of scale by sharing direct-routed transport facilities and providing their own tandem-switching. As we stated in the *Notice*, broader access competition should exert downward pressure on tandem-switched transport rates, while fostering more efficient provisioning of these services by new competitors and LECs. Competition also should encourage innovation and investment in new technologies and could offer increased network reliability through route diversity and redundancy. IXCs would benefit from greater competition in the tandem-switched service market. Small IXCs would especially benefit because they tend to rely more heavily on tandem-switched transport than larger IXCs. In addition, by promoting competition in tandem-switched transport services and facilitating the use of direct-trunked transport by small IXCs, these measures should help ensure more rational cost-based pricing relationships between LEC direct-trunked and tandem-switching transport services, thereby lessening the need for regulatory controls and fostering more efficient use of these services. All of these benefits should contribute to economic growth -- by enabling IXCs to use more efficient transport arrangements, by fostering better, more reliable, and more rationally priced access services, as well as by creating new market opportunities for interconnectors.

26. We also conclude that LECs can make signalling information available from their end offices at very little cost. Indeed, the record indicates that the costs to LECs of providing such information from end offices may well be *de minimis*, involving only a simple change in the end office routing table. While a few LECs baldly assert that the costs of providing signalling could be significant, these LECs do not substantiate their allegations with cost estimates or data.[80] Nor do they distinguish between end

---

[69] NYNEX Comments at 12; GTE Comments at 8, 10 & 11; Ameritech *Ex Parte* at 2.

[70] *See* Pacific Comments at A-7.

[71] *Id.* at A-7.

[72] NYNEX Comments at 13-14; Pacific Comments at A-8; Southwestern Bell Ex Parte Attachment at 3. Southwestern Bell and Pacific claim that this would require significant changes in LEC accounting systems. Southwestern Bell Ex Parte Attachment at 3-5; Pacific Comments at A-8. NYNEX and Pacific argue that if the LEC-measured amount exceeded the interconnector-measured amount, the LEC should bill the interconnector for the difference. NYNEX Comments at 13-14; Southwestern Bell *Ex Parte* Attachment at 3-5.

[73] NYNEX Comments at 13-14.

[74] Ameritech *Ex Parte* at 2.

[75] NYNEX Comments at 14; GTE Comments at 11; USTA Comments at 7-8.

[76] MFS Comments at 16-20, Reply at 5-8. *See also* ALTS Reply at 4.

[77] MFS Comments at 16-20, Reply at 5-8.

[78] *Id.*

[79] MFS Reply at 5-6 & n.4.

[80] As noted supra, n.46, while some LECs cite cost estimates submitted by Ameritech in its Comments, Ameritech subsequently clarified that these costs would not have to be incurred in order to transmit signalling information from an end office to an interconnector tandem. Ameritech *Ex Parte* at 1.

-office generated and tandem-generated signalling information. Moreover, no party has shown that the necessary modifications to LEC billing systems would be unreasonably costly or burdensome, or that the asserted need to change industry standards to accommodate the passage of CIC and OZZ codes over Feature Group D represents a significant barrier to the implementation of this proposal. On the contrary, we believe that any such measures could be accomplished without undue burden or cost.

27. Nor are we persuaded that competitive tandem switching services would require assignment of CICs to IXCs. NYNEX's assertion that multiple CICs would be required assumes that IXCs would be able to specify different routing for different calls originating at the same end office. Thus, NYNEX assumes, for example, that IXCs would seek to route certain calls to an interconnector tandem and others to a POP or a LEC tandem. NYNEX argues that the IXC would need additional CICs to reflect the additional routing options available to it. The record fails to indicate, however, that any entity would actually seek to offer or use that kind of routing dynamic. Even without additional CIC assignments, IXCs would be able to designate a primary route and an overflow route for their traffic, thereby securing the benefits of both route and carrier diversity. Moreover, IXCs could vary routing between a LEC and third party tandem on an end-office-by-end-office basis or, perhaps, based on OZZ codes -- thereby designating one as primary for a particular type of traffic and another for a different type of traffic. No IXC indicates that these options are insufficient, at least for now. Therefore, no additional CIC code assignments would have to be made to accommodate competitive tandem-switched networks.

28. U S West and others assert that third parties do not really want signalling information and that IXCs do not really want to use competitively-provided tandem-switching services. The record belies U S West's contention. The vast majority of parties, including IXCs, CAPs, users, and some LECs argue that unbundled signalling information would allow development of alternatives to LEC tandem-switched transport services and they urge us to make such information available.[81] Moreover, even if the measures we now take do not produce an immediate change in the access market, we think they will be beneficial in the long-term. By eliminating barriers to competition in the provision of tandem-switched services, we will be paving the way to a more competitive access market in the future.[82] Since the costs of providing signalling information from equal access end offices are so small, these benefits are well worth the costs.[83]

29. On the other hand, it appears that providing signalling information from LEC tandems would require software upgrades to those tandems.[84] In addition, the record indicates that tandem-provided signalling may be of less utility to TSPs than end office-provided signalling.[85] While MFS and ALTS claim generally that tandem-provided signalling could provide a useful adjunct to other forms of interconnection, they do not explain with any specificity how they could use such an architecture, or how a two-tandem architecture could actually be competitively viable, either from a service quality or pricing standpoint. Therefore, based on the current record, we do not require LECs to provide this service at this time.

30. We clarify that in proposing access to LEC signalling information from LEC end offices and tandems, we did not intend to require LECs to reconfigure their SS7 networks. Thus, we hold that LECs may provide end-office-generated signalling information through STPs, and they may require TSPs that are terminating traffic to transmit signalling information to LEC end offices through LEC STPs. We recognize that STPs perform important network screening functions; we do not require LECs to decentralize those functions by deploying them in every switch. Moreover, the record does not indicate that TSPs would seek to interconnect via SS7 at end offices, rather than at STPs. Rather, as AT&T and others point out, it would be far more efficient for them to interconnect at STPs.

31. Finally, with respect to billing of terminating traffic, we believe that, consistent with our earlier expanded interconnection measures, the customer of record of the terminating LEC should be billed by the terminating LEC for services provided by that LEC. If the TSP is the customer of record, the LEC should bill the TSP directly. If the TSP's customer is the customer of record, then the TSP must provide the LEC with billing tapes so that the LEC may properly count and bill access minutes. We reject the suggestion of some LECs that all discrepancies between TSP-provided billing tapes and LEC billing records should be resolved in favor of the LECs. We believe that TSPs and LECs can and should establish fair and reasonable procedures to resolve billing discrepancies.[86]

IV. COLLOCATION

32. *Notice*. In the *Notice*, we tentatively concluded that collocation of competitors' switches in LEC central offices is neither necessary nor desirable to promote facilities-based competition for switched access services.[87] We also tentatively concluded that interconnectors should not be entitled to place in the central office, or designate for their use, other types of switch-related equipment, such as that

---

[81] *See supra* ¶ ¶ 9-10.

[82] Moreover, the availability of signalling information to third parties could, in itself and even without actual entry into the market by competitive tandem-switching providers, subject LEC pricing to some additional competitive pressures.

[83] Our conclusion that LECs should be required to offer signalling information from equal access end offices is not based on application of the test that governs LEC BSE offerings since signalling information is not a BSE (*see infra* ¶ 54). Nevertheless, our conclusion is based on the same type of cost/benefit considerations.

[84] *See supra* ¶ 17.

[85] *See supra* ¶ 18.

[86] We do not base our decision that LECs must, in some instances, accept billing tapes from TSPs on MFS' co-carrier model. We are requiring LECs to make signalling information available to any third party, not just providers of competitive tandem-switched transport services. Thus, as noted, small IXCs may use signalling information as a way to aggregate their traffic on direct-trunked transport facilities purchased from a LEC so that they can enjoy the same scale economies as larger IXCs. In that situation, the IXC ordering the signalling and transport would be a reseller or aggregator, not a co-carrier. Indeed, if the meet-point billing model advanced by MFS applied, TSPs would not be able to purchase direct-trunked transport from a LEC, since LEC tandem-switched transport rates to the "meet-point" would apply.

[87] *Notice*, 7 FCC Rcd at 7748, ¶ 47.

used for call recording and traffic measurement.[88] We noted that while interconnector transmission equipment must be located in LEC central offices to terminate interconnector circuits, interconnectors could readily connect their transmission facilities to switches and related equipment located on their own premises. We also stated that we expected that interconnectors would prefer to locate their switches on their own premises. Finally, we noted that unlike transmission equipment, switching facilities can occupy a substantial amount of floor space, and as a result, mandated collocation could contribute greatly to space exhaustion.[89]

33. *Positions of the Parties.* The vast majority of parties support our tentative conclusion not to require collocation of interconnector switches or switch-related equipment in LEC offices.[90] They argue that the collocation of switching equipment offers no technical advantages because the location of switches does not affect the quality or cost of switching services.[91] Most commenters also agree that switches take up much more floor space than transmission equipment and, as noted in the *Notice*, that collocation of switching equipment could thus greatly accelerate the exhaustion of available floor space.[92] They argue that any reasonably sized switch would take up at least several hundred square feet.[93] Pacific adds that collocation could also require upgrades to heating, ventilation, and air conditioning systems.[94] MFS acknowledges that it would strongly prefer to locate its switching equipment on its own premises because switches generally require much more constant and careful monitoring and supervision than transmission equipment. It states, however, that its position is premised on the Commission's adoption of adequate non-discrimination safeguards to assure that interconnectors are not disadvantaged because of their inability to collocate switching equipment. Specifically, MFS requests that LECs not be permitted to manipulate rate structure or levels, or impose any technical criteria that confer an advantage due to the location of their tandem switches.[95] Finally, U S West argues that we lack authority to order collocation of switching equipment.[96]

34. Ad Hoc, on the other hand, favors mandatory collocation. Ad Hoc argues that only collocation can approximate the terms and conditions on which the LECs interconnect their own tandem circuits and that collocation reduces LEC opportunities for "strategic manipulation." It argues, further, that because the Commission has ordered collocation for transmission equipment, a different rule for switching equipment will require "line-drawing exercises that will create ongoing controversies, waste the Commission's scarce resources, and ultimately confuse the marketplace." Rather than perpetuate such line-drawing exercises, it states, the Commission should move towards a system of "mutual openness."[97]

35. *Discussion.* We now affirm our tentative conclusion that physical collocation of switching equipment should not be required. Virtually every commenter that addressed this issue supported our tentative conclusion and the reasoning behind it. Thus, they agree that there is no competitive or technical benefit to locating switching equipment in LEC offices; that switching equipment is too large and too heavy to be collocated in LEC space; and that interconnectors would prefer to place their switching equipment on their own premises for monitoring purposes. The arguments offered in support of mandatory collocation are not convincing. No one has shown why the line-drawing process between switching and transmission equipment would be unmanageable or that collocation is necessary to ensure fair and nondiscriminatory treatment of interconnectors by LECs. Indeed, our tariffing and general nondiscrimination requirements should provide sufficient protection against unfair or unreasonably discriminatory LEC rates and practices.

V. PRICING ISSUES

A. LEC Charges for Signalling Services

1. Notice and Background

36. In the *Notice*, we sought comment on whether LECs should price signalling information according to the new services test.[98] We also proposed that LECs not be allowed to use the net revenue test to justify new signalling service charges.[99]

2. Positions of the Parties

37. The majority of commenters favor the new services test.[100] On the other hand, Teleport, Teleport Denver, and Time Warner oppose it, arguing that signalling services

---

[88] *Id.*

[89] *Id.*

[90] *E.g.*, Ameritech Comments at 14; MFS Comments at 13-14; MCI Comments at 3-4; GSA Comments at 4; Southwestern Bell Comments at 12; U S West Comments at 5-7; USTA Comments at 11; Rochester Comments at 3; NYNEX Comments at 16; Bell Atlantic Comments at 1-2; Pacific Comments at 12-14; United Comments at 3; GTE Comments at 19-20.

[91] *E.g.*, Ameritech Comments at 14-15; NYNEX Comments at 16; United Comments at 8; Southwestern Bell Comments at 12-13; U S West Comments at 6-7.

[92] *E.g.*, MCI Comments at 3-4; Ameritech Comments at 14; USTA Comments at 12.

[93] *See, e.g.*, Ameritech Comments at 14. U S West asserts that its tandem switches occupy no less than 900 square feet and as much as 3900 square feet. U S West Comments at 7. *See also* MFS Comments at 14 (acknowledging Commission's floor space concerns).

[94] Pacific Comments at 14.

[95] MFS Comments at 14. *See also* ALTS Comments at 9-10 (agreeing that collocation is not necessary if Commission recognizes need for continued oversight to protect against discrimination by LECs).

[96] U S West Comments at 6.

[97] Ad Hoc Comments at 15-16.

[98] *Notice*, 7 FCC Rcd at 7748, ¶ 50.

[99] *Id.*

[100] *E.g.*, MCI Comments at 4-5; GSA Comments at 4-5. Reply at 6-7; ALTS Comments at 11-12; Ad Hoc Comments at 16-17; ITN Reply at 3-4; U S West Comments at 14; United Reply at 4-5; Rochester Reply at 7. *See also* Pacific Reply at 17-19 & n.44 (arguing that LECs should be able to recover their expense and investment, including reasonable overhead). MCI supports the new services test for setting initial rates for signalling and requests that interested parties have access to all LEC models used to justify their rates. MCI Comments at 4-5 & n.9. MCI states, however, that eventually, the rates for all LEC services must be based upon total service long run incremental costs and developed on a functional basis. *Id.* at 4-5.

should be priced based on incremental cost.[101] Southwestern Bell also appears to oppose the new services test, claiming that uniform overhead loadings are not likely to be consistent with marketplace realities.[102]

38. The parties differ on whether there should be a new rate element for signalling information. NYNEX contends that "no new rate elements would need to be created" for LEC end-office provisioning of signalling data.[103] Similarly, Ameritech argues that providing signalling data from the end office to an interconnector tandem would be similar to a trunk rearrangement.[104] GTE favors establishing a new rate element, arguing that even if signalling services can be based on existing network capabilities, the customers that choose to purchase those services should pay for the LEC costs incurred in developing and testing them and in making the necessary billing and ordering system changes.[105] Similarly, United asserts that LECs will incur costs in modifying their billing systems to bill interconnectors properly for LEC-provided transport between LEC end offices and interconnector tandems, and that they should recover those costs from interconnectors on a per call basis.[106] Pacific suggests that signalling services be offered through additional optional expanded interconnection rate elements for interconnectors that are collocated, and as optional rate elements on LEC transport services for those that are not collocated.[107] U S West also suggests establishing a separate signalling charge.[108]

39. MCI requests that we create a separate service category for signalling services and apply the same pricing constraints as those required for the tandem-switched transport service category.[109] MCI argues that a separate category is necessary to prevent LECs from raising rates for signalling services and reducing tandem-switched transport rates, while staying within the limits of the banding constraints.[110] Pacific and Rochester oppose MCI's request.[111] Pacific contends that it would impede the price cap goal of allowing LECs to adjust rates according to demand; Rochester argues that the price cap rules are sufficient to constrain alleged anticompetitive pricing without creation of additional service categories.[112]

40. MFS argues that rather than establishing new rate elements for signalling information needed for tandem-switching and treating interconnectors as resellers of LEC services, the Commission should treat interconnectors as "co-carriers" of switched access service.[113] Under this paradigm, MFS argues, LECs would recover the costs of providing signalling information from either: (1) the local switching charge; or (2) a new rate element applied to all switched access minutes that use tandem signalling.[114] Rochester supports "co-carrier" status of interconnectors, viewing it like Commission treatment of cellular carriers and adjacent LECs.[115] Rochester claims that MFS merely seeks recognition that it is not only a LEC competitor, but also a joint service provider.[116]

41. Most LECs, USTA, and AT&T oppose MFS' co-carrier model, including its pricing proposals. Some LECs argue that they must treat all of their customers alike and cannot practicably distinguish among customers based on the kinds of services those customers offer to others.[117] Pacific argues that even if such distinctions could be made, they may not be appropriate.[118] Some parties also dispute MFS' assertion that interconnectors should be viewed in the same light as a LEC that provides joint service with another LEC or as a cellular carrier that interconnects with a LEC network. They argue that neighboring LECs that provide joint service do so in order to transmit calls between separate franchise areas and do not compete in offering access service to the same locations, as do LECs and interconnectors.[119] Similarly, Pacific argues that cellular providers, unlike interconnectors, target a separate market of mobile customers who cannot be served in their automobiles by LEC landline services.[120]

42. Several parties strongly object to MFS' suggestion that the costs of providing signalling information to interconnectors should be borne by all switched access customers or all tandem-switched access customers. They argue that MFS is seeking a "free ride" and that its proposal is inconsistent with FCC policies dictating that the costs of providing a service should be paid by the users of that service.[121]

3. Discussion

43. We now conclude that LEC provision of CIC and OZZ data to TSPs from LEC end offices will constitute a new service under our price caps regime, which covers all Tier 1 LECs. New services "add to the range of options

---

[101] Teleport Comments at 3; Teleport Denver Comments at 3-5; Time Warner Comments at 5. For example, Teleport Denver argues that interconnectors have no choice but to buy LEC bottleneck facilities, and therefore, should not be "saddled" with the LECs' own inefficiencies, and that signalling should be based on the LEC's actual costs. Teleport Denver Comments at 3-5.

[102] Southwestern Bell Reply at 11-12 & n.28, citing MCI Comments at 4.

[103] NYNEX *Ex Parte* at 1. Given this statement, presumably NYNEX's earlier argument that LECs should recover their costs through a new rate element relates to tandem-provided signalling. *See* NYNEX Comments at 7-8, Reply at 6.

[104] Ameritech *Ex Parte* at 1. Ameritech, however, does not specifically oppose establishment of a new rate element.

[105] GTE Comments at 17, Reply at 10-11.

[106] United Comments at 2 & 7.

[107] Pacific Comments at 8-9, Reply at 32-33. *See also* Second Pacific *Ex Parte*, Attachment at 2.

[108] U S West Comments at 14.

[109] MCI Comments at 5-6.

[110] *Id.*

[111] Pacific Reply at 51-52; Rochester Reply at 7-8, citing MCI Comments at 5-6.

[112] Pacific Reply at 51-52; Rochester Reply at 7-8.

[113] MFS Comments at 16-20, Reply at 6-8.

[114] MFS Comments at 20. MFS also asserts that a separate rate element for tandem signalling would not be appropriate if the same end office equipment performs signalling for both direct-trunked and tandem-switched transport. In that case, MFS asserts costs should be recovered through the local switching charge. *Id.* at 20 n.18.

[115] Rochester Reply at 4.

[116] *Id.*

[117] *See, e.g.*, Ameritech Reply at 2; USTA Reply at 10-12; GTE Reply at 13.

[118] Pacific Reply at 25.

[119] Pacific Reply at 21-24; United Reply at 6-7.

[120] Pacific Reply at 25.

[121] Bell Atlantic Reply at 4-5; NYNEX Reply at 8; GTE Reply at 11.

already available to customers."[122] While LECs currently transmit CIC and OZZ codes to their own access tandems, they do not provide this information to their customers. Therefore, these data "add to the range of options" of LEC customers and hence represent a new service.[123]

44. LECs will be required to make a cost-based showing under the price caps new services test.[124] This showing will enable us to ensure that signalling services are reasonably priced. We will not use the net revenue test in reviewing LEC tariff filings.[125] That test is unnecessary, both because of our requirement that LECs submit cost support for new services, and because LECs clearly lack incentives to underprice signalling services provided to competitive tandem-switching providers.

45. We conclude further that LECs must establish new rate elements for CIC and OZZ signalling data as a separate service category within the trunking basket. This category will be subject to an upper pricing band of 2%. Because LECs have no incentive to price signalling services at predatory levels, we see no need for a lower band and therefore do not impose one. We agree with MCI that these measures are necessary to prevent LECs from offsetting increases in the price of signalling information provided to TSPs with price reductions in the LECs' own tandem-switched transport rates.

46. We reject MFS' pricing proposals. First, for the reasons discussed previously, we do not believe that the co-carrier model advanced by MFS aptly defines the LEC/TSP relationship.[126] Second, the MFS pricing proposals are not necessarily consistent with a co-carrier model. For example, even though we have stated that cellular service providers are like co-carriers,[127] we have never held that cellular interconnection charges should be imposed on all LEC customers or on all cellular users, rather than on the providers taking interconnection. Thus, a co-carrier model does not necessarily dictate that the costs unique to providing a joint service should always be directly imposed on the LEC's customers or on all customers of the service in question. Yet this is precisely the result that MFS seeks. Third, we do not believe that the specific cost recovery mechanism advocated by MFS is appropriate. Whereas MFS would have all purchasers of switched transport or tandem-switched transport bear the costs of making signalling information available to TSPs, we believe that TSPs should pay for such costs. This is consistent with the Commission's long-held view that costs should be paid by the cost causer.

B. Recovery of Support Flows

47. *Notice and Background.* In the *Transport Order*, we instituted an interconnection charge to be paid by all interstate access customers that interconnect with the LEC switched access network, including IXCs and competitive access providers.[128] The interconnection charge was created at the time we adopted the interim rate structure as a residual charge to make the transport rate structure revenue neutral. The initial transport interconnection charge was computed as the difference between the revenue generated by rates for transport before the interim rate structure was implemented and the revenues from facilities-based transport rate elements under the interim rate structure.[129] In the *Notice*, we tentatively concluded that there was no need to develop an additional charge to recover support flows associated with tandem switching because the interconnection charge already includes such support flows.[130]

48. *Positions of the Parties.* Several commenters, including interconnectors and some LECs, assert that there is no need to establish an additional charge to recover support flows associated with tandem switching.[131] MCI and MFS argue that the transport interconnection charge more than adequately protects any LEC subsidy flows.[132] According to MFS, the interconnection charge will not only recover revenues sufficient to preserve subsidies, but will recoup various LEC capital and operating costs that should be captured through cost-based charges for specific services.[133] Further contribution, MFS maintains, would be unreason-

---

[122] The LEC Price Cap Order defines new services by stating that "as long as the pre-existing service is still offered, and the range of alternatives available to consumers is increased, we will classify the service as new." Policy and Rules Concerning Rates for Dominant Carriers, Second Report and Order, 5 FCC Rcd 6786, 6824 (1990), *modified on reconsideration* (*Rates for Dominant Carriers Reconsideration*), 6 FCC Rcd 2637 (1991), *further modified*, 6 FCC Rcd 4524 (1991).

[123] While LECs appear to be able to provide this new service without implementing new technology, the need -- or absence of need -- for new technology does not dictate the categorization of the service under price caps. *See* Provision of Access for 800 Service, Second Report and Order, 8 FCC Rcd 907, 911 (1993) (rejecting claims that basic 800 data base service should be classified as a new service because it requires implementation of new technology). Rather, this factor affects the costs and thus the price that LECs may charge for a new service.

[124] *See* Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture, Policy and Rules Concerning Rates for Dominant Carriers, Report and Order & Order on Further Reconsideration & Supplemental Notice of Proposed Rulemaking, 6 FCC Rcd 4524, 4528-4531, ¶ ¶ 24-44 (1991), Memorandum Opinion & Order on Second Further Reconsideration, 7 FCC Rcd 5235 (1992).

[125] This is consistent with our decision to eliminate the net revenue test for new service offerings under price caps. *See* Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture, 7 FCC Rcd 5235, 5237, ¶ 12 (1992).

[126] *See supra* n.86 .

[127] *See* The Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services, 2 FCC Rcd 2910, 2916 (1987).

[128] Transport Rate Structure and Pricing, Report and Order and Further Notice of Proposed Rulemaking, 7 FCC Rcd 7006, 7038-7040 , ¶ ¶ 61-64 (1992).

[129] *Transport Order*, 7 FCC Rcd at 7038, § 61. *See also* Transport Rate Structure and Pricing, Order and Further Notice of Proposed Rulemaking, 6 FCC Rcd 5341, 5347, ¶ 28 (1991).

[130] *Notice*, 7 FCC Rcd at 7748, ¶ 51.

[131] Teleport Comments at 3; MFS Comments at 21; MCI Comments at 5, Reply at 8-9; Teleport Denver Comments at 5; Ad Hoc Comments at 17; ALTS Comments at 12-13; NYNEX Comments at 18-19; Rochester Reply at 8 n.22. Rochester asserts, however, that to the extent that existing separations and cost allocation rules create uneconomic distortions in exchange carriers' pricing, the Commission should take corrective action. Rochester Reply at 8 n.22.

[132] MFS Comments at 21; MCI Comments at 5, Reply at 8-9. *Accord* Teleport Denver Comments at 5.

[133] MFS Comments at 21.

ably discriminatory, anticompetitive, and unnecessary.[134] NYNEX states that a contribution charge is not necessary because, for an interim period, the local transport interconnection charge will recover support flows associated with switched transport, including tandem switching.[135] U S West states, however, that if the Commission maintains the interim rate structure restrictions on LEC tandem-switching pricing, it should consider establishing a contribution charge for interconnectors.[136]

49. Southwestern Bell contends that new competition in the tandem-switched and switched transport markets will reduce LEC revenues from those services and create upward pressure on the prices for other LEC services, including basic local service rates.[137] Therefore, it claims, the interconnection charge will not be sufficient to preserve universal service, as MFS and ALTS allege, unless LECs are able to alter their rates based on market conditions.[138]

50. *Discussion* . It appears from the record that there is no need for additional support mechanisms in conjunction with adoption of this order. The transport interconnection charge is sufficient to protect support flows potentially affected by our decision here.

C. ONA Framework

51. *Notice*. In the *Notice*, we also asked parties to comment on whether signalling functions should be treated as Basic Service Elements (BSEs) within the Open Network Architecture (ONA) framework.[139]

52. *Positions of the Parties*. Several commenters argue that signalling should not be treated as a BSE.[140] Their reasons vary. Most of the LECs, USTA, AT&T, and GSA claim that the ONA framework is inappropriate for signalling.[141] As NYNEX states:

> ONA is a regulatory initiative to help the growth of unregulated enhanced services, while ensuring equal and nondiscriminatory access to basic network services for all enhanced services market participants. . . . ONA . . . was simply not designed for application to the regulated basic services market.[142]

Some commenters also assert that subjecting signalling to ONA would have only limited utility because ONA only applies to the BOCs.[143] GTE argues that the other LECs may not have the technical ability to both unbundle a signalling service offering and also obtain the usage data required to bill for that service.[144] Some LECs argue that because signalling is necessary to provide switched access, it is illogical to unbundle it and treat it as an option that a customer could choose not to purchase.[145] AT&T and Ameritech claim that it does not make sense to require an interconnector that will provide its own transport to purchase a BSA in order to obtain signalling information, since transport is a BSA.[146]

53. In contrast, Pacific and Teleport Denver favor BSE treatment of signalling information.[147] Pacific maintains that some type of BSA would be technically required for a LEC to deliver signalling information to an interconnector: collocated interconnectors would need a "'short BSA'" (*e.g.*, cross connect), while non-collocated interconnectors might purchase a dedicated access service BSA.[148] Finally, although Ad Hoc argues that signalling generally should be treated within the ONA framework, it urges us to avoid the failings of ONA.[149]

54. *Discussion*. We conclude that unbundled CIC and OZZ data are not BSEs as defined in our ONA orders and that there is no public policy reason to treat them equivalently. BSEs are "optional unbundled features . . . that an ESP may require or find useful in configuring an enhanced service."[150] There has been no showing that the CIC and OZZ data that are the subject of this order will be used by ESPs to provide enhanced services. Rather, these data will be used by TSPs to provide basic network services. Thus, these data do not fall within our definition of a BSE.

---

[134] *Id.* at 21.

[135] NYNEX Comments at 18-19.

[136] U S West Comments at 16.

[137] Southwestern Bell Comments at 6, Reply at 8-9.

[138] Southwestern Bell Reply at 8-9 & 13-15. Ad Hoc and ALTS ask that the interconnection charge be removed or reduced. Ad Hoc Comments at 17; ALTS Comments at 12-13. Pacific opposes these requests, arguing that the charge is necessary for LECs to recoup required costs, such as the costs of complying with universal service obligations, and costs that have been overallocated to competitive services based on regulated accounting requirements. Pacific Reply at 35.

[139] *Notice*, 7 FCC Rcd at 7748, ¶ 46.

[140] *E.g.*, Ameritech Reply at 1-2; GTE Comments at 17-19, Reply at 14-16; NYNEX Comments at 15; Southwestern Bell Comments at 21-22; BellSouth Reply at 5-6; USTA Comments at 10; AT&T Comments at 6-7.

[141] GTE Comments at 17-19, Reply at 14-16; NYNEX Comments at 15; Southwestern Bell Comments at 21-22; BellSouth Reply at 5-6; USTA Comments at 10; AT&T Comments at 6-7; GSA Reply at 6-7.

[142] NYNEX Comments at 15. *See also* Ad Hoc Comments at 7-8; GTE Reply at 14-15.

[143] GTE Comments at 18-19; USTA Comments at 10; AT&T Comments at 6 n.6. The Commission recently extended ONA application to GTE as well. Application of Open Network Architecture and Nondiscrimination Safeguards to GTE Corporation, Report and Order, FCC No. 94-58 (released April 4, 1994).

[144] GTE Comments at 19. *See also* USTA Comments at 10 (arguing that BSE requirement for non-ONA carriers would be onerous).

[145] GTE Comments at 17, Reply at 15; Southwestern Bell Comments at 21-22. The only choice a customer would have, according to GTE, is different signalling options (e.g., separate prices for MF and SS7 signalling).

[146] AT&T Comments at 6-7; Ameritech Reply at 2. Ameritech notes that the "Ameritech Customers First Plan" proposes full unbundl ing of its network, including the local loop. Ameritech Reply at 2. This unbundling, Ameritech argues, will reduce the number of services that a LEC customer or competitor might have to take in conjunction with signalling. Accordingly, Ameritech claims that it would be counterproductive to place signalling into a model such as ONA that contemplates provision of other network elements. *Id.*

[147] Pacific Reply at 30-31; Teleport Denver Comments at 5.

[148] Pacific Reply at 30-31.

[149] Ad Hoc Comments at 7-10.

[150] Filing and Review of Open Network Architecture Plans, 4 FCC Rcd 1, 36 (1988).

55. Nor has any party convinced us that it would be in the public interest to treat CIC and OZZ codes as BSEs. While some parties argue that the four-part test that LECs use in determining whether to offer an ESP-requested BSE should apply, we have relied on similar considerations in assessing the relative costs and benefits of LEC-provided signalling information. Moreover, the "flagging" requirements associated with BSEs, under which BOCs must identify BSEs that they intend to use themselves, are irrelevant: there is no dispute that LECs use CIC and OZZ data for tandem-switched transport service. Finally, there would be no added benefit from a pricing standpoint in treating CIC and OZZ data as BSEs, since we have already held that the new services test applies to their initial rates.

VI. TARIFFING AND IMPLEMENTATION

56. *Positions of the Parties.* Few parties commented on the tariffing aspects of our proposal. MFS argues that LECs should be required to provide the CIC and OZZ from end offices within a reasonably short time.[151] Ameritech and U S West contend that they would be willing to provide signalling at end offices upon *bona fide* request, assuming that the requisite modifications were feasible, and that interconnectors would pay for them.[152]

57. *Discussion.* We require Tier 1 LECs (except NECA members) to file tariffs, with requisite cost support, for the provision of CIC" and OZZ codes within ninety days of publication of this order in the Federal Register, to be effective on forty-five days' notice. As discussed above, the record in this proceeding shows that LECs can provide CIC and OZZ codes to third parties from equal access end offices simply by modifying their end office routing tables, without purchasing new end office software and without making other costly and time-consuming modifications. Under the circumstances, there is no reason why the LECs cannot tariff this offering for all of their equal access end offices within ninety days of publication of this order in the Federal Register.

VII. LEC PRICING FLEXIBILITY

58. *Notice and Background.* In the *Notice*, we proposed to increase LEC pricing flexibility in conjunction with our Phase I proposal for expanded interconnection for switched transport services. We also asked for comment on whether we should give LECs additional pricing flexibility as part of our proposal to require LECs to provide signalling information to third parties.[153]

59. In the *Switched Transport Expanded Interconnection Order*, we granted Tier 1 LECs additional flexibility in pricing their switched transport services.[154] We concluded that the price cap rules did not sufficiently enable LECs to respond to access competition because: (1) the study area-wide rate averaging requirement forced LECs to price above cost in the high-traffic, lower-cost areas where competition was most likely to develop; and (2) LECs were prohibited from offering any volume or term discounts in their transport rates, even if those discounts were cost-justified.[155] We decided to proceed in stages to remove restrictions on LEC transport pricing flexibility. We authorized zone density pricing of LEC entrance facilities, direct-trunked and tandem-switched transport, and dedicated signalling transport when expanded interconnection for switched access is operational in a study area.[156] We also permitted LECs to offer volume and term discounts on entrance and interoffice facilities when they meet one of two conditions.[157] In the *Transport* proceeding, we granted LECs additional pricing flexibility, changing our rules to enable access customers to order direct-trunked transport between LEC tandems and SWCs.[158]

60. *Comments.* Because comments and replies in this Phase were filed prior to the adoption of the *Switched Transport Expanded Interconnection Order* and the *First Transport Reconsideration*, the parties largely focus on the matters at issue in those proceedings. Generally, LECs, with support from GSA, argue strenuously for more pricing flexibility.[159] They ask specifically for authority to offer volume and term discounts and to implement density zone pricing.[160] Some also ask for permission to provide services under individually negotiated contracts with access customers.[161] U S West, NYNEX, and Pacific seek permission to price the link between their access tandems and SWCs on a flat-rated, rather than usage, basis.[162] Some LECs also express support for an access reform proposal

---

[151] MFS Reply at 2.

[152] Ameritech Comments at 6-8; U S West Reply at 6. *See also* Rochester Comments at 2-3 (stating that it may make signalling features available in advance of any Commission requirement to do so).

[153] *Notice*, 7 FCC Rcd at 7748-7749, ¶ 52.

[154] *Switched Transport Expanded Interconnection Order*, 8 FCC Rcd at 7422-7436, ¶ ¶ 87-120.

[155] *Id.* at 7423-7424.

[156] *Id.* at 7424. Under density zone pricing, LECs may effect some geographic deaveraging of their access rates. The same density zones apply for switched transport and special access expanded interconnection. *Special Access Expanded Interconnection Order*, 7 FCC Rcd at 7451-7458, ¶ ¶ 172-186. *Switched Transport Expanded Interconnection Order*, 8 FCC Rcd at 7426 & n.229, ¶ 98. In the *Baskets and Bands Order*, we incorporated the density zone pricing subcategories into the existing zone subcategories within the existing DS3 and DS1 special access subcategories, except for when a LEC implements density zone pricing for transport in a different tariff year than it implemented density zone pricing for special access. *Baskets and Bands Order* at ¶ ¶ 24-25.

[157] *Id.* at 7432-7436, ¶ ¶ 113-120. These conditions are: (1) 100 DS-1 equivalent switched transport cross-connects have been taken in the "zone 1" offices in the study area; or (2) an average of 25 DS1-equivalent switched transport cross-connects per zone 1 office have been taken. *Id.* at 7434-7435, ¶ 118.r

[158] Transport Rate Structure and Pricing, First Memorandum Opinion and Order on Reconsideration, 8 FCC Rcd 5370, 5372 (1993) (*First Transport Reconsideration*).

[159] *E.g.*, BellSouth Comments at 1-2, Reply at 3; USTA Comments at 2-3; Southwestern Bell Comments at 6-12, Reply at 8; Bell Atlantic Comments at 1-4, Reply at 4; Pacific Comments at 9-11, Pacific Reply at 50-51; NYNEX Comments at 19; U S West Comments at 17-18, Reply at 12; GSA Comments at 5-6.

[160] *See, e.g.*, Ameritech Comments at 9; Rochester Comments at 9; BellSouth Reply at 3; and GTE Reply at 5.

[161] *See* Ameritech Comments at 9; GSA Comments at 6.

[162] U S West Comments at 17; NYNEX Comments at 19; Pacific Reply at 38.

advanced by USTA in Phase I of this proceeding, under which four new price cap baskets would be created and the degree of regulation of each would be tailored to the competitiveness of the market area.[163] Several LECs argue that the pricing flexibility measures proposed in the *Notice* do not go far enough. These LECs state that they must have the same pricing flexibility enjoyed by their competitors if there is to be fair competition in the marketplace and if customers are to obtain the benefits of competition.[164] Some object, in particular, to the pricing bands for service categories, arguing that such bands diminish the benefits of density zone pricing by limiting total price reductions within a service category.[165]

61. CAPs, users, and IXCs oppose granting LECs additional pricing flexibility in conjunction with tandem signalling at this time.[166] These parties argue that potential competition is not equivalent to actual competition, and that even after expanded interconnection arrangements are available, it will take time for interconnectors to be an effective competitive force to discipline LEC pricing.[167] They argue that if LECs are provided additional pricing flexibility before sufficient actual competition in the provision of tandem signalling develops, LECs could use pricing flexibility to control the market.[168] Ad Hoc proposes that LECs be granted pricing flexibility when there is "actual competition" and proposes a "good actor" test as a framework for determining its existence.[169] ALTS and MFS argue that the Commission can determine whether additional pricing flexibility is necessary after competitive switched access networks are actually operating, based on empirical and verifiable data.[170]

62. CompTel and WilTel also argue that LECs have competitive advantages in the provision of tandem-switched transport because LECs can enjoy economies from combining access, local, and intraLATA toll traffic on their interoffice facilities.[171] Teleport claims that the interim transport rate structure gives the LECs a competitive advantage, since they need only recover 20% of tandem costs from users of LEC tandem services (compared to 100% that interconnectors will have to recover), and are permitted to measure mileage based on airline miles (while interconnectors will have to measure it based on actual miles).[172]

63. *Discussion.* We do not here grant LECs additional pricing flexibility but will continue to examine these issues in a broader context in future consideration of pending access reform petitions. We have already addressed virtually all of the specific proposals suggested by LECs in the *Switched Transport Expanded Interconnection Order* and the *First Transport Reconsideration*. Thus, LECs may offer density zone pricing and volume and term discounts under certain conditions. In addition, they may price transport between their tandems and SWCs on a flat-rate basis. We considered and rejected in the *Switched Transport Expanded Interconnection Order* various other requests for flexibility. For example, the Commission rejected the suggestion that LECs receive the same pricing flexibility as their competitors, noting that giving LECs too much flexibility could stifle competitive entry and harm customers of less competitive services. The Commission also declined to eliminate service category pricing bands, stating that these bands serve important public policy goals.[173] No party has shown that providing signalling information to TSPs warrants a different outcome. Nor has any party set forth any other specific pricing flexibility request related to providing signalling information. Finally, no party has demonstrated that the availability of signalling warrants authorization of LEC contract tariffs. The Commission has limited contract carriage to services found to be "substantially competitive."[174] While the measures we now take should permit alternatives to LEC tandem-switched access services to develop, we cannot conclude that these services are now subject to substantial competition.

64. For these reasons, we do not grant LECs additional pricing flexibility in conjunction with our decision to make tandem signalling information available. This decision is not intended, however, to prejudge broader questions regarding the possible need for access charge reform.[175] Indeed, by opening the door to greater competi-

---

[163] USTA Comments at 3; BellSouth Comments at 2-3; GTE Comments at 23.

[164] *See, e.g.*, Southwestern Bell Comments at 8-11; Bell Atlantic Comments at 1; Pacific Reply at 43-44; and Rochester Reply at 8-9.

[165] Southwestern Bell Comments at 8-9; Ameritech Comments at 13-14.

[166] Ad Hoc Comments at 18-21; ALTS Comments at 13, Reply at 12-15; CompTel Comments at 2-4, Reply at 4-6; MFS Comments at 21-23, Reply at 8-11; Teleport Comments at 3; Time Warner Comments at 4; WilTel Comments at 7. WilTel notes that it already has supported LEC pricing flexibility for interoffice transport rates, including density zone pricing and term discounts, provided that benchmarking is in place. WilTel Comments at 7.

[167] *E.g.*, ALTS Reply at 13; MFS Reply at 21-23. Teleport asserts that LECs should not be able to request immediate pricing flexibility and at the same time argue that it will take several years to implement tandem interconnection. Teleport Reply at 5.

[168] Ad Hoc Comments at 18-19.

[169] *Id.* at 20-21. The "good actor" test, according to Ad Hoc, is generally met when: (1) the FCC has established a policy or program; (2) LECs have taken certain necessary steps to fulfill that policy or program; and (3) the success of the policy is manifested in the marketplace. *Id.* Ad Hoc also argues that additional pricing flexibility not be granted until the Commission has gained further experience with special access and switched transport expanded interconnection. *Id.*

[170] ALTS Reply at 14; MFS Comments at 23. Pacific argues that if the Commission were to review market data to determine whether to grant LECs pricing flexibility, we should consider the entire access services market and require information from interconnectors in addition to LECs. Pacific Reply at 52-53.

[171] CompTel Reply at 5; WilTel Comments at 4-5.

[172] Teleport Reply at 5 n.10.

[173] *Switched Transport Expanded Interconnection Order*, 8 FCC Rcd at 7430-7431, ¶ 109.

[174] The Commission has authorized AT&T to offer some of its long-distance services pursuant to individually negotiated contracts. But even AT&T, which faces competition for all or virtually all of its services, may include in its contracts only those services the Commission has found to be substantially competitive. Thus, for example, AT&T may not include residential services in its contracts, even though there are a number of competitive residential service offerings. *See* Competition in the Interstate Interexchange Marketplace, Report and Order, 6 FCC Rcd 5880 (1991).

[175] Several petitions regarding access reform are pending at the Commission. *See, e.g.*, "Customers First: Ameritech's Advanced Universal Access Plan" (filed March 1, 1993); "NARUC Petition for Notice of Inquiry Addressing Access Issues" (filed June 25,

tion in the provision of tandem-switched services, we are continuing the process of removing barriers to the development of a more competitive access market in which CAPs and other entities can participate.

VIII. OTHER ISSUES

A. Reciprocity

65. *Positions of the Parties.* Teleport Denver and Pacific ask that any obligations that the Commission imposes on LECs with respect to providing signalling information also be imposed on interconnectors. They argue that reciprocal interconnection will promote efficient network design by allowing all service providers, including LECs, to purchase services from the most economical vendor, and thereby avoid duplication of facilities.[176] Ameritech requests reciprocity so that if, in the future, it wanted to provide tandem-signalling for customers served by competitors' switches, it could do so.[177] GSA agrees with Ameritech, arguing that interconnectors should be required to provide LECs with the same type of information that LECs provide to interconnectors.[178] Rochester asserts that reciprocity would be beneficial to development of the "'network of networks,'" because it will enable all providers to choose how best to configure their networks to offer consumers the full benefits of expanded interconnection, and will foster mutual recognition of the value of interconnection arrangements.[179]

66. *Discussion.* We decline to impose reciprocal signalling obligations on interconnectors at this time. First, requests for reciprocal obligations are beyond the scope of this proceeding. The *Notice* proposed that LECs provide signalling information to third parties. We did not propose to impose reciprocal requirements on these third parties, and we decline to broaden this proceeding to consider such requirements here. Second, LEC requests for reciprocity seem to assume that only CAPs will purchase signalling information. As noted, this information must be made available to any interested party, including IXCs. LECs requesting reciprocity fail to address the implications of their proposal with respect to these other types of TSPs. Third, except in the few instances where CAPs have end offices, tandem switching providers simply do not have the signalling information to provide to the LECs, and the LECs have not demonstrated specific, present needs for such information. Furthermore, we note that TSPs do not possess market power. For example, we have previously declined to impose reciprocal obligations on interconnectors, noting, *inter alia*, that CAPs and other interconnectors do not control bottleneck facilities.[180]

B. Jurisdictional Measurement and Reporting

67. *Notice and Background.* In the *Phase I Notice*, we stated that LECs and interconnectors are likely to provide both intrastate and interstate services using the same facilities.[181] We also noted that LECs generally will be unable to determine the jurisdictional nature of terminating traffic.[182] Additionally, we stated that because LECs generally apply different access charges for interstate and intrastate traffic, it might be necessary to impose some jurisdictional reporting requirements on interconnectors.[183] Thereafter, in the *Phase I Order*, we required the customer of record to provide percentage of interstate use (PIU) reports to the LEC.[184] We found that the switched access customer is in the best position to provide information on the jurisdictional nature of minutes of use.[185] In that order, we also decided that where an end user is the switched access customer, the IXC providing service to that end user must report the PIU.[186]

68. In the Phase II *Notice*, we tentatively concluded that interconnectors or their customers should be required to measure the jurisdictional nature of their traffic, and report it to the LECs.[187] We sought comment on whether interconnectors or their IXC customers should be responsible for reporting this information.[188]

69. *Positions of the Parties.* The majority of commenters argue that the PIU should be reported by the customer of record, *i.e.*, the party that purchases access from the LEC.[189] Parties differ on which party should be the customer of record. MCI claims that the customer of record

---

1993); "USTA Petition for Reform of the Interstate Access Rules," RM 8356 (filed September 17, 1993); "NYNEX Transition Plan to Preserve Universal Service In A Competitive Environment" (filed December 15, 1993). *See also* Price Cap Performance Review for Local Exchange Carriers, CC Docket 94-1, Notice of Proposed Rulemaking, 9 FCC Rcd 1687, 1705-06 (1994) (noting that we expect that in the process of reviewing LEC performance under price caps, we will develop data and information relevant to fashioning a workable plan for revising the baseline price cap model as competition develops).

[176] Teleport Denver Comments at 4; Second Pacific *Ex Parte* Attachment at 1.

[177] Ameritech Comments at 4-5.

[178] GSA Reply at 4.

[179] Rochester Reply at 5-6. *See also* Ad Hoc Comments at 15-16 (arguing that the Commission should move toward a system of "mutual openness," in which "interconnections and connectivity are available equally"). Rochester states that it will not condition the offering of its Open Market Plan on the Commission's adoption of reciprocity. *Id.* at 5 n.14.

[180] *See Switched Transport Expanded Interconnection Order*, 8 FCC Rcd at 7402, ¶ 44.

[181] *Notice*, 7 FCC Rcd at 7746-7747, ¶ 39.

[182] *Id.*

[183] *Id.*

[184] *Switched Transport Expanded Interconnection Order*, 7 FCC Rcd at 7442-7443, ¶ 137.

[185] *Id.*

[186] *Id.*

[187] *Notice*, 7 FCC Rcd at 7749, ¶ 53.

[188] *Id.*

[189] *E.g.*, Ameritech Comments at 4 & 17; NYNEX Comments at 20-21; GTE Comments at 11 n.15 & 21-22, Reply at 19-20; U S West Comments at 18-19; USTA Comments at 8-9, Reply at 15; Southwestern Bell Comments at 23; BellSouth Reply at 6; MCI Comments at 7; Ad Hoc Comments at 21; ALTS Reply at 16. U S West and USTA assert that there are no unique jurisdictional reporting issues regarding provision of signalling to interconnector tandems, while NARUC suggests that our PIU proposal appears to be consistent with the current reporting system. U S West Comments at 18-19; USTA Comments at 8-9; NARUC Comments at 6.

NARUC criticizes the current PIU reporting system, arguing that it allows customers to control their jurisdictional costs without verification. NARUC Comments at 6-7. Similarly, Ad Hoc supports continuation of the current PIU reporting system only until it can be replaced by an alternative system and recommends adoption of a "revenue transfer mechanism" that

should be the CAP or IXC.[190] while Ameritech argues that it would probably be the CAP.[191] GTE maintains that the interconnector must report the PIU for terminating traffic because LECs would not be able to identify the appropriate IXC;[192] United contends that, when technically feasible, the interconnector should report the PIU.[193] ALTS, on the other hand, argues that either the IXC or end user would likely be the customer of record.[194] while Time Warner contends that generally IXCs should report the PIU.[195] ALTS contends that the CAP would be functioning as a LEC co-carrier, not *as* a customer of access services, and that the entity that orders and pays for LEC terminating access should bear responsibility for reporting the jurisdictional nature of its traffic.[196] Like ALTS, MFS argues that interconnectors are carriers. In contrast to ALTS, however, MFS, asserts that interconnectors should be required to record traffic that is capable of being recorded. MFS states that IXCs should be required to provide jurisdictional data for traffic that cannot be recorded and that interconnectors and LECs should divide responsibility for jurisdictional measurement and should exchange information, as do LECs participating in meet-point switched access arrangements.[197] Prodigy requests that we exempt information service providers from the PIU reporting requirement. US West objects to this request, arguing that PIU reports are essential and no party should be exempted from the requirement to provide them.[198]

70. The DC PSC contends that CAP or IXC estimates of interstate use are likely to be biased.[199] It argues further that measurement is possible with SS7 technology and requests that we require "as a condition of expanded interconnection, that all CAPs implement SS7 technology and that the CAPs' SS7 facilities be interconnected with those of the LECs."[200] Finally, Rochester maintains that the Commission should establish strict PIU reporting and auditing requirements.[201]

71. *Discussion.* Most parties agree that the customer of record should be responsible for reporting the PIU factor for terminating traffic when the LEC cannot itself measure jurisdiction. This is consistent with existing reporting arrangements that have worked satisfactorily. If the customer of record is a TSP, it shall be the responsibility of that TSP to compile PIU reports based on data from those to whom it provides tandem-switching. If the customer of record is an IXC or other purchaser of access, that entity shall continue to provide PIU reports directly to the LEC providing terminating access.

C. Separations Issues

72. *Notice.* The *Notice* asked parties to discuss whether our proposal for competitive provision of tandem switched transport service raises separations issues that should be referred to a Joint Board.[202]

73. *Positions of the Parties.* NARUC states that switched access restructuring, including the proposed competitive provision of tandem-switched transport, will have "immediate and direct effects on state regulation and, potentially, rates in rural and high cost areas."[203] It argues that at a minimum, the Commission should require the Joint Board to address all the potential effects of interstate access restructure and pricing policies on state regulation and rates in high cost areas.[204] NYNEX recommends that the Commission, with the assistance of the Joint Board, conduct a comprehensive review of policy issues surrounding increased access competition, access rate structure, capital recovery and other related matters prior to any review of current separations rules and procedures.[205] The DC PSC argues that the LECs' loss of interstate revenue from increased competition in the access market will shift unused investment to intrastate jurisdictions, and raise intrastate costs.[206] It recommends that prior to an increase in state rates, the Commission and the Joint Board should consider whether any changes should be made to reduce this impact. The DC PSC also suggests that a floor be established for usage percentage based on pre-expanded interconnection usage to protect intrastate ratepayers if LEC interstate traffic decreases as a result of competition.[207] NARUC also argues for Joint Board referral of PIU measurement and verification procedures.[208]

74. *Discussion.* We do not believe that the signalling information requirement raises separations issues that should be referred to a Joint Board. The record does not show that providing signalling information will raise any significant issues beyond those already referred to the Joint Board in the *Switched Transport Expanded Interconnection Order*.[209] As noted, the costs associated with LEC provision of CIC and OZZ codes from equal access end offices should be minimal. Therefore, we do not believe that these costs or the revenues derived from providing signalling information requires Joint Board consideration. The *Notice* stated that we did not intend to refer to the Joint Board broader separations issues, such as those raised by the DC PSC, NARUC, and Rochester. We found and continue to

---

could be based on caps, indexing, and dollar targets. Ad Hoc Comments at 21. U S West argues that Ad Hoc's proposal is beyond the scope of this proceeding. U S West Reply at 11-12.

190 MCI Comments at 7.

191 Ameritech Comments at 17.

192 GTE Reply at 20. GTE contends that for this reason, the customer of record for interconnection must be the same as the customer of record for switched access. *Id.*; GTE Comments at 22.

193 United Reply at 9.

194 ALTS Comments at 14-15. *See also* ALTS Reply at 15 -16.

195 Time Warner Reply at 9-10.

196 ALTS Comments at 14-15, Reply at 15-16.

197 MFS Comments at 24.

198 Prodigy Comments at 3; U S West Reply at 11-12.

199 DC PSC Comments at 1-2 and attached Phase I Comments at 3.

200 *Id.*

201 Rochester Comments at 4.

202 *Notice*, 7 FCC Rcd at 7749, ¶ 53.

203 NARUC Comments at 5.

204 *Id.*

205 NYNEX Comments at 20-21. ALTS, however, urges that any reference of separations issues to a Joint Board not delay delivery of the benefits of increased competition in the local access market. ALTS Comments at 15.

206 DC PSC Comments at 2: ("Intrastate ratepayers should not be required to pay for FCC decisions regarding interstate traffic").

207 DC PSC Comments at 2-3.

208 NARUC Comments at 7.

209 *Switched Transport Expanded Interconnection Order*, 8 FCC Rcd at 7446-7448, ¶ ¶ 147-151.

believe that these matters would be more properly addressed in the context of a comprehensive separations review proceeding.

IX. CONCLUSION

75. In this order, we take another step in our ongoing effort to promote competition in the interstate access market. We require Tier 1 LECs (except NECA members) to provide signalling information from equal access end offices to interested parties. This measure will allow third parties to provide tandem switching and thereby promote development of alternatives to LEC-provided tandem-switched transport services. CAPs may develop their own tandem-switching networks; other TSPs may use tandem-switching to achieve scale economies attending the aggregation of traffic. By promoting access to diverse facilities and providers, our action should permit more efficient use and deployment of interstate access services, increase network reliability and redundancy, encourage innovation, and exert downward pressure on access charges and long-distance rates. These benefits should, in turn, contribute to economic growth and the creation of new job opportunities.

X. REGULATORY FLEXIBILITY ACT

76. In the *Notice*, we certified that the proposed rule changes would not have a significant economic impact on a substantial number of small business entities, as defined by § 601(3) of the Regulatory Flexibility Act.[210] We also stated that to the extent that a PIU reporting requirement would apply to small entities, it would not have a significant economic impact on a substantial number of small business entities. No commenting party disagreed with our analysis. The Secretary shall send a copy of this Report and Order, including the certification, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with § 605(b) of the Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. §§ 601 *et seq.*

XI. ORDERING CLAUSES

77. Accordingly, it is ORDERED, pursuant to authority contained in Sections 1, 4(i), 201-205, and 214(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151(i), 154, 201-205, and 214(d), that Parts 61, 64 & 69 of the Commission's rules, 47 C.F.R. §§ 61, 64 & 69, are AMENDED as set forth in Appendix B hereto.

78. IT IS FURTHER ORDERED that the policies, rules, and requirements set forth herein ARE ADOPTED, effective 80 days after publication of this order in the Federal Register.

79. IT IS FURTHER ORDERED that the Tier 1 LECs subject to this order shall file tariff amendments as specified herein within ninety days of publication of this order in the Federal Register, to be effective on forty-five days' notice.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

APPENDIX A

CC Docket 91-141
April 2, 1993
Comments

1. Ad Hoc Telecommunications Users Committee (Ad Hoc)
2. Association for Local Telecommunications Service (ALTS)
3. AT&T
4. Ameritech Operating Companies (Ameritech)
5. Bell Atlantic Telephone Companies (Bell Atlantic)
6. BellSouth Telecommunications, Inc. (BellSouth)
7. Competitive Telecommunications Association (CompTel)
8. District of Columbia Public Service Commission (DC PSC)
9. General Services Administration (GSA)
10. GTE Service Corporation (GTE)
11. Independent Data Communications Manufacturers Association (IDCMA)
12. Information Industry Association (IIA)
13. MCI Communications Corporation (MCI)
14. MFS Communications Co., Inc. (MFS)
15. National Telephone Cooperative Association (NTCA)
16. National Association of Regulatory Utility Commissioners (NARUC)
17. NYNEX Telephone Companies (NYNEX)
18. Pacific and Nevada Bell (Pacific)
19. Prodigy Services Company (Prodigy)
20. Rochester Telephone Corporation (Rochester)
21. Southwestern Bell Telephone Co. (Southwestern Bell)
22. Teleport Communications Group (Teleport)
23. Teleport Denver Limited (TDL)
24. Time Warner Telecommunications (Time Warner)
25. United States Telephone Association (USTA)

[210] *Notice*, 7 FCC Rcd at 7749, ¶ 57.

26. United Telephone Companies (United)

27. U S West Communications, Inc. (U S West)

28. WilTel, Inc. (WilTel)

CC Docket 91-141
April 30, 1993
Reply Comments

1. Allnet Communications Services, Inc. (Allnet)

2. Ameritech

3. Anchorage Telephone Utility (Anchorage)

4. ALTS

5. AT&T

6. Bell Atlantic

7. BellSouth

8. CompTel

9. GSA

10. GTE

11. IDCMA

12. Independent Telecommunications Network, Inc. (ITN)

13. MCI

14. MFS

15. NTCA

16. NYNEX

17. Pacific

18. Rochester

19. Southwestern Bell

20. Teleport

21. Time Warner

22. USTA

23. United

24. U S West

25. WilTel

APPENDIX B

Rule Changes

AMENDMENTS TO THE CODE OF FEDERAL REGULATIONS

PART 61 -- TARIFFS

1. The authority citation for Part 61 continues to read as follows:

AUTHORITY: Sec. 4, 48 Stat. 1066, as amended; 47 U.S.C. 154. Interpret or apply sec. 203, 48 Stat. 1070; 47 U.S.C. 203.

2. Section 61.42 is amended by adding paragraph (e)(2)(vii) to read as follows:

§ 61.42 Price cap baskets and service categories.

* * * * *

(e) (2) * * *

(vii) Signalling for tandem switching, as described in § 69.129 of this chapter.

3. Section 61.47 is amended by adding paragraph (g)(5) as follows:

§ 61.47 Adjustments to the SBI; pricing bands.

* * * * *

(g) (5) The upper pricing band for the "Signalling for tandem switching" service category shall limit the upward pricing flexibility for this service category, as reflected in its SBI, to two percent, relative to the percentage change in the PCI for the trunking basket, measured from the levels in effect on the last day of the preceding tariff year. There shall be no lower pricing band for this service category.

PART 64 -- MISCELLANEOUS RULES RELATING TO COMMON CARRIERS

Part 64 of Title 47 of the Code of Federal Regulations is amended as follows:

1. The authority citation for Part 64 continues to read as follows:

AUTHORITY: Section 4, 48 Stat. 1066, as amended; 47 U.S.C. 154, unless otherwise noted. Interpret or apply secs. 201, 218, 225, 48 Stat. 1070, as amended, 1077; 47 U.S.C. 201, 218, 225, unless otherwise noted.

2. Section 64.1401 is amended by adding paragraph (i) to read as follows:

* * * * *

(i) The local exchange carriers specified in paragraph (a) of this section shall offer signalling for tandem switching, as defined in § 69.2 (vv) of this chapter, at central offices that are classified as equal office end offices or serving wire centers, or at signal transfer points if such information is offered via common channel signalling.

PART 69 -- ACCESS CHARGES

Part 69 of Title 47, Code of Federal Regulations, is amended as follows:

1. The authority citation for Part 69 continues to read as follows:

AUTHORITY: Secs. 4, 201, 202, 203, 205, 218, 403, 48 Stat. 1066, 1070, 1072, 1077, 1094, as amended, 47 U.S.C. 154, 201, 202, 203, 205, 218, 403.

2. Section 69.2 is amended by adding paragraph (vv) to read as follows:

§ 69.2 Definitions.

* * * * *

(vv) "Signalling for tandem switching" means the carrier identification code (CIC) and the OZZ code, or equivalent information needed to perform tandem switching functions. The CIC identifies the interexchange carrier and the OZZ identifies the interexchange carrier trunk to which traffic should be routed.

3. Section 69 of is amended by adding section 69.129, to read as follows:

§ 69.129 Signalling for tandem switching.

A charge that is expressed in dollars and cents shall be assessed upon the purchasing entity by a local telephone company for provision of signalling for tandem switching.

SEPARATE STATEMENT

OF

COMMISSIONER ANDREW C. BARRETT

RE: Expanded Interconnection with Local Telephone Company Facilities, (CC Docket No. 91-141, Transport Phase II)

In this Report and Order, the Commission builds on the prior expanded interconnection decisions on special access and switched transport by removing regulatory barriers to increase competition in interstate switched access services.[1] In the prior decisions that allowed third parties to enter the transmission of switched access transport service, the Commission proposed to require local exchange carriers (LECs) to provide signalling for tandem switched transport to enable competing access providers (CAPs) to begin to provide the tandem switching. Accordingly, this decision requires Tier 1 local exchange carriers, except for NECA pool members, to provide signalling information from LEC equal access end offices to tandem switching providers -- such as CAPs -- that request it in order to allow these entities to provide tandem switching services and compete with the LECs.

I have stated that the previous expanded interconnection decisions were significant steps toward competition for interstate access services.[2] I believe that this decision will not have significant adverse effects on residential or small business subscribers or service to rural areas to the extent that universal service support flows in the current transport rate structure will be reflected in the transport interconnection charge. In addition, the decision is a balanced approach to increasing competition for interstate access by requiring signalling information only from the LEC end office rather than at the tandem switch; this requirement avoids imposing network architecture at much greater costs. Moreover, I am interested in continuing to monitor the results of this decision and I am hopeful that it will represent another step toward a more competitive industry structure that could be reflected in a more streamlined regulatory framework.[3]

---

[1] See Report and Order and Notice of Proposed Rulemaking, CC Docket No. 91-141, 7 FCC Rcd 7369 (1992); Second Report and Order and Third Notice of Proposed Rulemaking, CC Docket No. 91-141,8 FCC Rcd 7374 (1993).

[2] See Second Report and Order, CC Docket No. 91-141,8 FCC Rcd 7374 (1993)(Separate Statement of Commissioner Andrew C. Barrett).

[3] See Price Cap Performance Review for Local Exchange Carriers, Notice of Proposed Rulemaking, CC Docket No. 94-1, (Separate Statement of Commissioner Andrew C. Barrett).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

Voyager Networks, Inc. File No. I-T-C-94-221

Application for Authority
pursuant to Section 214 of the
Communications Act of 1934, as
amended, to Establish and Operate
International Private Line and
Switched Resale Services

ORDER AND CERTIFICATION

Adopted: May 20, 1994; Released: June 15, 1994

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the resale of international switched services for the provision of international switched telecommunications services and of international private lines for the provision of non-interconnected international private line services[1] to the general public by Voyager Networks, Inc. ("Voyager").

2. Accordingly, IT IS ORDERED that application File No. I-T-C-94-221 IS GRANTED and Voyager is authorized to resell, pursuant to the tariffs of authorized international common carriers,[2] international switched services for the provision of international switched telecommunications services and international private lines not interconnected to the public switched network for the provision of international private line services[3] between the United States and each of the twenty-three (23) international points specified in Appendix A.[4]

3. IT IS FURTHER ORDERED that Voyager is authorized to lease and operate a one-half interest in up to 67 E-1 circuits for the provision of its authorized resale of international private lines for non-interconnected private line services, as specified in Appendix A.

4. IT IS FURTHER ORDERED that neither Voyager nor any persons or companies directly or indirectly controlling it or controlled by it, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions which is denied to any other United States carrier by reason of any concession contract, understanding, or working arrangement to which Voyager or any such persons or companies controlling or controlled by Voyager are parties.

5. IT IS FURTHER ORDERED that our authorization of Voyager to resell international private lines for the provision of non-interconnected private line service is limited to the provision of such private line service between the United States and each of the 23 international points specified in Appendix A -- that is, private lines which carry traffic that originates in the United States and terminates in one of the 23 international points, or originates in one of the 23 international points and terminates in the United States. In addition, Voyager may not -- and Voyager's tariffs must state that Voyager's customers may not -- connect private lines provided over these facilities to the public switched network at either the U.S. or the foreign end, or both, for the provision of international basic telecommunications services, including switched voice services, unless authorized to do so by the Commission upon a finding that the foreign country affords resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates*, Phase II, First Report and Order, 7 FCC Rcd 559 (1991), *Order on Reconsideration and Third Further Notice of Proposed Rulemaking* (*Third Further Notice*), 7 FCC Rcd 7927 (1992), *fONOROLA Corporation and EMI Commu-*

---

[1] Application at 2.

[2] The applicant proposes to resell the private lines and switched services of one or more of the following carriers pursuant to their applicable tariffs: AT&T Tariff FCC Nos. 1,2,4,9,11 and 12; MCI International Tariff FCC No. 1; MCI/OTI Tariff FCC No. 3; MCI/WUI Tariff FCC No. 27; Sprint Tariff FCC Nos. 1,2,5, and 7; Worldcom Tariff FCC No. 1; TRT-FTC Tariff FCC No. 14; TRT International Tariff FCC No. 1; and FTC Tariff FCC Nos. 17 and 23.

[3] The Commission has concluded that the public interest in cost-based international telecommunications services would be served by the encouragement of international resale, provided that steps were taken to ensure that such resale did not result in the unilateral diversion of U.S. inbound switched traffic to private lines, and thus, exacerbate the settlements deficit. The Commission, therefore, conditioned its resale policy by requiring U.S. carriers to permit resale of their international private lines only to those countries which afford equivalent resale opportunities. (*See Regulation of International Accounting Rates*, CC Docket 90-337, (*Phase II First Report and Order*), 7 FCC Rcd 559 (1992).) Subsequently, the Commission stated that the resale of international private lines for the provision of international private line services, as opposed to switched services, does not implicate the settlements process to the extent such lines are used only to carry non-switched traffic that is not subject to the international settlements process, and thus clarified that the equivalency requirement does not apply to the resale of international private lines for private line services. Nonetheless, the Commission confirmed the right of an end user to interconnect its international private line to the PSN through, for example, its own PBX. (*See Regulation of International Accounting Rates*, CC Docket 90-337, *Phase II Order on Reconsideration and Third Further Notice of Proposed Rulemaking* (*Phase II Third Further Notice*), 7 FCC Rcd 7927 (1992).)

[4] *See* Appendix A for list of authorized international points. We note that should Voyager obtain any interest in facilities beyond the authorized twenty-three international points for the purpose of providing common carrier services, including private line service, between the U.S. and other international points, such action would constitute an extension of line under Section 214 of the Act. Therefore, under the provisions of the Commission's *International Competitive Carrier Policies*, 102 FCC 2d 812 (1985), *recon. denied* 60 R.R. 2d 1435 (1986), it would be necessary for Voyager to file additional applications for a certificate of public convenience and necessity under Section 214 to begin service to each additional country and for authority to acquire any facilities needed to provide service to such additional points.

nications Corporation (fONOROLA/EMI Order), 7 FCC Rcd 7312 (1992), *Order on Reconsideration*, FCC 94-81 (released May 6, 1994).

6. IT IS FURTHER ORDERED that Voyager shall file tariff provisions pursuant to Section 203 of the Communications Act, 47 U.S.C. §203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

7. IT IS FURTHER ORDERED that Voyager shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

8. IT IS FURTHER ORDERED that Voyager shall file a copy of any operating agreements entered into with foreign correspondents with the Commission within 30 days of their execution, and shall otherwise comply with the filing requirements contained in Section 43.51 of the Commission's Rules, 47 C.F.R. §43.51.

9. IT IS FURTHER ORDERED that this Order may be subject to future modification pursuant to the outcome of the *Phase II Third Further Notice* and any related proceedings.

10. IT IS FURTHER ORDERED that nothing in this authorization should be construed to include authorization for the transmission of money in connection with the services Voyager seeks authority to provide. The transmission of money is not considered to be a common carrier service.

11. This Order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the public notice of this Order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Appendix A

Non-Interconnected Private Lines

Country	E-1 Circuits
United Kingdom	10
Japan	5
Singapore	2
Switzerland	2
Germany	2
France	2
Canada	10
Brazil	2
Hong Kong	2
Australia	2
Korea	2
Taiwan	2
Italy	2
The Netherlands	2
Sweden	2
Denmark	2
Dominican Republic	2
Russia	2
Finland	2
Mexico	2
British Virgin Islands	2
Thailand	2
Romania	2
Antigua	1
Jamaica	1

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

NorLight, Inc. File No. I-T-C-94-179

Application for Authority Pursuant to
Section 214 of the Communications Act,
As Amended, to Provide Facilities-based
Private Line, Point-to-Point or Point-to-
Multipoint Voice and Data Services
Between the United States and Canada

ORDER AND CERTIFICATE

Adopted: May 20, 1994; Released: June 15, 1994

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, we find that the present and future public convenience and necessity require the provision of international private line service not interconnected to the public switched network (PSN) between the United States and Canada by NorLight, Inc. ("Norlight").

2. Accordingly, IT IS HEREBY ORDERED that application File No. I-T-C-94-179 IS GRANTED and Norlight is authorized to:

a. acquire and operate up to 1 DSO circuit to provide the services authorized herein;[1] and

b. use said facilities to provide non-interconnected private line voice and data service between the United States and Canada.

3. IT IS FURTHER ORDERED that the applicant shall file with the Commission copies of any operating agreements it enters into with its foreign correspondents within 30 days of their execution, and shall otherwise comply with the filing requirements contained in Section 43.51 of the Commission's Rules, 47 C.F.R. § 43.51.

4. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Commission's Rules, 47 C.F.R. § 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this order.

5. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 U.S.C. § 43.61.

6. IT IS FURTHER ORDERED that the applicant shall obtain authorization pursuant to Section 214 of the Communications Act, 47 U.S.C. § 214, before acquiring any additional circuits or channels of communication for the provision of service over any separate satellite system or private cable system.

7. IT IS FURTHER ORDERED that the applicant shall file semi-annual circuit addition reports pursuant to Section 63.15(b) of the Commission's Rules, 47 C.F.R. §63.15(b).

8. IT IS FURTHER ORDERED that our authorization of the applicant to provide international private line service is limited to the provision of such private line traffic only between the United States and Canada -- that is, private lines which carry traffic that originates in the United States and terminates in Canada, or which originates in Canada and terminates in the United States. In addition, Norlight may not -- and Norlight's tariffs must state that Norlight's customers may not -- connect private lines provided over these facilities to the public switched network at either the U.S. or the foreign end, or both, for the provision of international basic telecommunications services, including switched voice services, unless authorized to do so by the Commission upon a finding that the foreign country affords resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates*, Phase II, First Report and Order, 7 FCC Rcd 559 (1991), *Order on Reconsideration and Third Further Notice of Proposed Rulemaking (Third Further Notice)*, 7 FCC Rcd 7927 (1992), *fONOROLA Corporation and EMI Communications Corporation (fONOROLA/EMI Order)*, 7 FCC Rcd 7312 (1992), *Order on Reconsideration*, FCC 94-81 (released May 6, 1994).

9. IT IS FURTHER ORDERED that neither the applicant nor any persons or companies directly or indirectly controlling or controlled by the applicant, or under direct or indirect common control with the applicant, shall acquire or enjoy any right, for the purpose of handling or interchanging traffic to or from the United States, its territories or possessions, which is denied to any other United States carrier by reason of any concession, contract, understanding, or working arrangement to which the applicant or any persons or companies controlling or controlled by the applicant are parties.

10. This order is issued under Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules, 47 C.F.R. § 1.106 and 1.115, may be filed within thirty days of the date of public notice of this order. (*See* 47 C.F.R. § 1.4(b)(2)).

[1] Norlight will offer such service by leasing the transmission capacity of Optinet Telecommunications, "a private carrier." Norlight Application at 2. Norlight will offer and provide such service to domestic business customers. *Id. Regulation of International Accounting Rates*, Order on Reconsideration and Third Further Notice of Proposed Rulemaking, 7 FCC Rcd 7927, 7931 (1993) (a carrier that leases capacity from a private carrier is to be considered facilities-based).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief. International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 93-162

In the Matter of

Local Exchange Carriers' Rates,
Terms, and Conditions for
Expanded Interconnection for
Special Access

SUPPLEMENTAL DESIGNATION ORDER AND ORDER TO SHOW CAUSE

Adopted: May 27, 1994; Released: May 31, 1994

Supplemental Direct Cases: June 15, 1994
Oppositions: June 22, 1994

By the Deputy Chief, Common Carrier Bureau:

I. INTRODUCTION

1. On June 9, 1993, the Common Carrier Bureau (Bureau) released the *Suspension Order*[1] which, *inter alia*, partially suspended the special access expanded interconnection tariffs filed by the Tier 1 local exchange carriers (LECs)[2] and initiated an investigation into the lawfulness of these tariffs. On July 23, 1993, the Bureau released a *Designation Order*[3] in the above-captioned docket, which designated issues to be investigated and directed LECs to file direct cases regarding the rate levels, rate structures, and terms and conditions in the special access expanded interconnection tariffs. In the instant Order, we designate additional issues to be investigated and establish a pleading cycle. These issues, which relate to certain LECs' use of time and materials charges[4] for central office construction for physical collocation, were raised by a number of parties that commented on the LECs' direct cases.

II. BACKGROUND - CONSTRUCTION CHARGES

A. Expanded Interconnection Order

2. On October 19, 1992, the Commission released the *Expanded Interconnection Order*, CC Docket No. 91-141,[5] which required Tier 1 LECs to file tariffs offering expanded interconnection for special access services to all interested parties.[6] In light of the LECs' substantial market power over expanded interconnection offerings, the Commission established certain tariffing requirements to prevent anticompetitive pricing and discrimination.[7]

3. The Commission required that the cross-connect element and any future contribution charge be provided pursuant to generally available tariffs at study area-wide averaged rates. The Commission stated that since these elements will be fairly standard, there would be no need for the greater flexibility that is possible with use of individually negotiated tariff provisions. The Commission also determined that with respect to "certain other connection charge rate elements," charges under general tariffs may reasonably differ by central office due to variations in costs -- but should be uniform for all interconnectors in each individual central office. For physical collocation, these charges include labor and materials charges for initial preparation of central office space.[8] The Commission noted that if different interconnectors desire arrangements that require different amounts of time (*i.e.*, labor) and materials to construct, total charges could reflect these differences, but the unit charges for labor and material should be uniform in each central office.[9]

4. Because it concluded that time and materials charges for central office construction reasonably can be standardized within each central office, the Commission did not allow individually negotiated tariffed arrangements for central office construction. By contrast, the Commission stated that rates for the use of different types of central office electronic equipment dedicated to interconnectors under virtual collocation arrangements are "best tailored to reflect individual circumstances."[10]

---

[1] Local Exchange Carriers' Rates, Terms, and Conditions for Expanded Interconnection for Special Access, CC Docket No. 93-162, 8 FCC Rcd 4589 (Com. Car. Bur. 1993) (*Suspension Order*).

[2] These LECs are listed in Appendix A of the *Suspension Order*. We note that the Centel Telephone Company, as it was known in prior Orders, is now the Central Telephone Company. In addition, we now refer collectively to Central Telephone Company and United Telephone Company, which filed all pleadings in this investigation jointly, as United/Central.

[3] Local Exchange Carriers' Rates, Terms and Conditions for Expanded Interconnection for Special Access, CC Docket No. 93-162, 8 FCC Rcd 6909 (Com. Car. Bur. 1993) (*Designation Order*).

[4] The terms "time and materials charges" and "labor and materials charges" are used interchangeably throughout this Order.

[5] Expanded Interconnection with Local Telephone Company Facilities, CC Docket No. 91-141, Report and Order and Notice of Proposed Rulemaking, 7 FCC Rcd 7369 (1992) (*Expanded Interconnection Order*), *recon.*, 8 FCC Rcd 127 (1992); *further modified on recon.* 8 FCC Rcd 7341 (1993); *other pets. for recon. pending, appeal pending sub nom.*, Bell Atlantic Corp. v. FCC, No. 92-1619 (D.C. Cir., filed Nov. 25, 1992).

[6] *Expanded Interconnection Order*, 7 FCC Rcd at 7372; 7398. The *Expanded Interconnection Order* excluded NECA pool members from this filing requirement. This effectively excluded only Puerto Rico Telephone Company, which is the only Tier 1 LEC that is also a NECA pool member. *Id.* at 7398.

[7] *Id.* at 7441-42.

[8] The Commission also included charges for central office space usage under physical collocation, and other charges that reasonably can be standardized for each central office, such as those for power, environmental conditioning, and use of riser and conduit space. *Id.* at 7442.

[9] *See id.* Further, the Commission stated that labor and materials charges may include appropriate overhead loadings and may differ by type of personnel or by time of day. *Id.* at 7442 n.356.

[10] *Id.* at 7442. The Commission stated that although it would

5. On February 16, 1993, the LECs filed tariffs pursuant to the *Expanded Interconnection Order*. In their physical collocation tariffs, most LECs proposed to charge specific rates for central office construction, which includes both site preparation and cage construction. Bell Atlantic and US West, however, proposed to tariff all central office construction on an individual case basis (ICB). Lincoln's tariff proposed specific rates, except for an "Application Fee" that functioned as an ICB.[11] Rochester stated that nonrecurring costs will be calculated on a "fully allocated" time and materials basis, and would be specified in its tariff.[12] Rochester, however, did not specify unit charges in its tariff. United/Central stated that it would charge for all cage construction on a time and materials basis, but did not tariff specific unit charges.[13] United/Central also included a tariff provision that suggests it would develop rates for construction in response to individual customer requests.[14]

B. Comments on Time and Materials Charges in Petitions Against Expanded Interconnection Tariffs

6. In petitions to reject or suspend and investigate the expanded interconnection tariffs, several parties objected to the LECs' use of ICB pricing and of time and materials charges as defined in their tariffs.[15] MFS alleged that ICB pricing for cage construction violates the *Expanded Interconnection Order*.[16] Ohio PUC disputed United's time and materials provision, arguing that United/Central should have generally tariffed rates for central office construction. According to Ohio PUC, interconnectors will be substantially disadvantaged if the LEC can later specify a significant charge.[17]

7. In their replies to the petitions, Rochester and Bell Atlantic defended their time and materials charges and ICB rates, respectively. They argued that the construction costs associated with making space ready for interconnectors to occupy are not susceptible to a uniform tariffed rate because they depend on the amount, location, and configuration of the interconnector's space.[18]

8. United/Central explained that in addition to its time and materials rate provision, it offers customers the option of construction through a third party contractor that is satisfactory to the carrier and the customer.[19] According to United/Central, this option removes the ability of United/Central to inflate construction costs.[20] Further, United/Central objected to providing fixed construction rates in its tariff, arguing that its ratepayers should not be forced to bear the risk of changes in outside labor and materials charges or imprecise estimation of the average cost of cage configurations -- particularly when United/Central lacks experience in cage construction. In addition, United/Central maintained that adoption of a standard cage design would not be in the best interests of customers needing different designs. Finally, United/Central claimed that site preparation (including extension of heating, air conditioning, power, and fire protection systems) is not a function that is susceptible to being offered at a fixed rate because the design and installation of these systems varies significantly from office to office.[21]

C. The Bureau's Suspension Order

9. In the *Suspension Order*, the Bureau, *inter alia*, explained that while the *Expanded Interconnection Order* permits uniform per unit pricing (labor charges for each type of worker and unit charges by type and quantity of material) for some physical collocation rate elements, it does not permit ICB pricing for physical collocation rate elements.[22] Accordingly, the Bureau ordered LECs that tariffed any or all physical collocation rate elements as ICBs -- Bell Atlantic, US West, Lincoln, and United/Central -- to delete references to ICB charges from their physical collocation tariffs. These LECs were directed to tariff specific rates or time and materials charges.[23]

10. In their compliance filings, Bell Atlantic, US West, and Lincoln deleted references to ICB charges. US West and Lincoln tariffed specific rates for cage construction and site preparation. Bell Atlantic tariffed specific rates for cage construction, but stated that it would tariff all other construction on a time and materials basis. As discussed in Section V., *infra*, United/Central did not revise its tariff pursuant to the *Suspension Order*.

D. Comments on Time and Materials Charges in Oppositions to Direct Cases

11. While the Bureau's *Designation Order* did not ask the parties to comment on the LECs' time and material charges for central office construction, Ohio PUC, MFS,

---

allow LECs and interconnectors to negotiate the rates, terms, and conditions of such connection charge subelements, it will require the LECs to file these rates, terms, and conditions, which must then be made available to all similarly situated interconnectors under tariff. *Id.* at 7442-43.

[11] The $7,500 Application Fee would be adjusted to reflect the actual cost of the service preparation and cable installation.

[12] *See* Rochester Telephone Corporation, Tariff F.C.C. No. 1, Transmittal No. 193, Section 7.8.2 (C)(3) (filed May 20, 1993; effective June 16, 1993).

[13] *See* United and Central Companies, Tariff F.C.C. No. 1, Section 17.6(D)(11), Transmittal No. 1 (filed Feb. 15, 1994; effective Mar. 2, 1994). United/Central also stated that if it must install environmental support to prepare the space for collocation, the charges will be calculated and billed to the interconnector on a time and materials basis. *See id.*

[14] *See* United and Central Companies, Tariff F.C.C. No. 1, Transmittal No. 1, Section 17.6 (C) (filed Feb. 15, 1994; effective Mar. 2, 1994) (provision also in earlier United and Central tariffs that were cancelled by Transmittal No. 1). That provision states in pertinent part: "When an interconnector submits a bona fide request for physical collocation ... the Telephone Company will develop the rates and charges applicable for collocation of the Interconnector's equipment and facilities at the requested location. The Telephone Company shall file the rates and charges in this tariff within 45 days' [sic] of the date of the request, to become effective upon 45 days' notice."

[15] *See, e.g.*, Teleport Petition at App. A Item 22; MCI Petition at 7; Ad Hoc Petition at 15-17.

[16] MFS Petition at 30; 45.

[17] Ohio PUC Petition at 6.

[18] Bell Atlantic Reply at App. A Item 3; Rochester Reply at 4-5.

[19] United/Central Reply at 8-9.

[20] In its petition to reject the expanded interconnection tariffs, discussed *supra*, MFS noted with approval United/Central's tariff provision that permits a mutually agreed-upon contractor selected by the interconnector to construct the cage. MFS claims that if LECs offered this option, there would be no need for an investigation of central office construction charges. MFS Petition at 30 n.69.

[21] United/Central Reply at 9-11.

[22] *Suspension Order*, 8 FCC Rcd at 4600.

[23] *Id.*

and Teleport object to such charges in their oppositions to the direct cases. Ohio PUC opposes United's time and materials charges on the ground that interconnectors may find themselves saddled with significant business expenses upon occupancy. Further, Ohio PUC observes, other LECs have quantified charges that reasonably allow recovery of the central office construction charge.[24]

12. MFS asserts that Bell Atlantic's proposal to replace its ICB rates with hourly rates for an unspecified amount of labor hours and unspecified materials costs raises concerns that Bell Atlantic will impose unreasonable charges upon competitors seeking collocation. MFS urges the Commission to require Bell Atlantic to file specific central office preparation charges accompanied by full cost support, as other LECs have done.[25] Finally, Teleport contends that Bell Atlantic's description of its time and materials charges for large portions of its construction activities fails to comply with the Commission's requirement that LECs specify these costs and rates.[26]

13. In its rebuttal, United/Central defends its time and materials charges for cage construction and space preparation.[27] According to United/Central, uniform prices are inappropriate when the amount of space to be occupied is not necessarily standard.[28] United/Central also asserts that construction costs will not be uniform, and objects to averaging costs to arrive at a uniform rate. Finally, United/Central submits that concerns about unexpected charges are alleviated through quotes available prior to construction, as well as its option of allowing customers to use independent contractors to perform cage construction.[29] Bell Atlantic justifies its time and materials charges on the ground that space preparation costs vary widely and unforeseen costs may be incurred when the work actually begins. Bell Atlantic considers it reasonable to charge the customer for the exact amount of time and materials needed to prepare the space.[30]

E. Bell Atlantic Transmittal No. 613

14. On November 18, 1993, Bell Atlantic filed Transmittal No. 613, which took effect on February 16, 1994 subject to the Docket 93-162 investigation.[31] In Transmittal No. 613, Bell Atlantic proposed a number of revisions relating to its charges for central office construction.[32] For example, Bell Atlantic proposed to submit estimates within 25 days of receiving a request for construction of a cage.

15. MFS filed an opposition, arguing that a procedure whereby Bell Atlantic would provide estimates of construction charges to potential collocators would be tantamount to establishing charges through an independent contract rather than by filing tariff revisions. MFS characterizes Bell Atlantic's filing as an ICB rate and asserts that it violates the prohibition against ICB pricing in the *Suspension Order*. MFS urges Bell Atlantic to file revisions that list specific rates for the construction function in each of its central offices.[33]

16. Bell Atlantic replies that it will file the actual construction charges in its collocation tariff after construction is completed, instead of filing the estimate before the start of construction. According to Bell Atlantic, collocators request changes in specific features during construction that would require filing a number of revisions to the price estimates. Therefore, Bell Atlantic argues, filing actual charges after construction is completed will eliminate the need to file a number of tariff revisions and will allow it to accommodate collocators' requests for customized construction more efficiently.[34]

III. DISCUSSION

17. In the telecommunications industry, carriers typically develop specific charges appearing in generally available tariffs based on averaged costs. Pricing access services on an individual case basis thus represents a departure from normal practice and is usually reserved for unique or unusual common carrier service offerings for which the carrier does not yet have sufficient experience to develop general rates. Rather than basing initial rates on averaged costs, carriers develop rates in response to each customer request for the service. Once sufficient knowledge is gained about the costs of the service, the Commission requires that the ICB rates be converted to averaged rates applicable to all customers.[35]

18. In the *Expanded Interconnection Order*, the Commission did not permit ICB pricing for certain connection charge elements, including the labor and material charges for initial preparation of central office space under physical collocation. Rather, the Commission reasoned that the need to protect interconnectors from anticompetitive pricing and discrimination by the LECs outweighed the LECs' need to be able to structure such charges to meet the individual needs of interconnectors. The Commission, however, did permit carriers to develop generally available tariffs containing different time and materials charges for different central offices. The Commission explained that if different physical interconnection arrangements require different amounts of time and materials to construct, the construction charges for interconnectors could be different.

---

[24] Ohio PUC Opposition at 3-4.

[25] MFS Opposition at 17-18.

[26] Teleport Opposition, App. A at 4.

[27] United/Central, however, does not mention the section of its tariff that suggests it will develop rates in response to individual customer requests. *See* footnote 14, *supra*.

[28] United/Central notes that a customer may request and, when appropriate, receive more or less than 100 square feet of space. United/Central Rebuttal at 5 n.10.

[29] *Id.* at 4-6.

[30] Bell Atlantic Rebuttal, Attachment at 5. According to Bell Atlantic, its approach is similar to that used by other landlords and building contractors and recognizes that collocators may have different needs.

[31] Bell Atlantic Telephone Companies, Transmittal No. 613, CC Docket No. 93-162, 9 FCC Rcd 976 (Com. Car. Bur. 1994).

[32] As mentioned, *supra*, Bell Atlantic tariffed specific rates for cages, but stated that it would tariff all other construction on a time and materials basis.

[33] MFS Opposition at 1-2.

[34] Bell Atlantic Reply at 1-2.

[35] *See generally* Local Exchange Carriers' Individual Case Basis DS3 Service Offerings, CC Docket No. 88-136, 4 FCC Rcd 8634 (1989), *on recon.*, 5 FCC Rcd 4842 (1990). The filing of an individual case basis rate does not affect the general availability of a service offering. Individual case basis rates are "generally available" if tariffs embodying these rates are filed and are available to all similarly situated customers. *See id.* at 8642 (*citing* Sea Land Services, Inc. v. ICC, 738 F.2d 1311, 1317 (D.C. Cir. (1990)).

provided the unit charges for labor and material are uniform for all interconnectors that take service in each individual central office.[36] In the *Suspension Order*, we reiterated the Commission's conclusion that uniform per unit pricing -- but not ICB pricing -- is permitted for central office construction.[37]

19. Based on the record now before us, it appears that Bell Atlantic, United/Central, and Rochester, those LECs who state that they tariffed central office construction on a time and materials basis, misunderstood the Commission's discussion of time and materials charges in the *Expanded Interconnection Order*. These LECs have not tariffed time and materials charges on a per unit basis, as directed by the *Expanded Interconnection Order*. Although they state that their rates are based on time and materials charges, they do not display particular charges in their tariffs and instead imply that they will develop rates for construction in response to individual customer requests, *i.e.*, on an ICB basis.

IV. ISSUE DESIGNATED

20. Accordingly, we designate for investigation the issue of whether the foregoing LECs' approach to time and materials charges for central office construction is reasonable in light of the Commission's *Expanded Interconnection Order*. To assist in our resolution of this issue, Bell Atlantic, United/Central, and Rochester are directed to provide the information listed below. We invite interested parties to comment on the LECs' supplemental direct cases.

1. Bell Atlantic, United/Central, and Rochester should explain how their approach to time and materials charges differs from the use of individual case basis rates.

2. In the *Expanded Interconnection Order*, the Commission described time and materials charges as generally available rates that vary based on the labor and materials needed for construction in individual central offices. Bell Atlantic, United/Central, and Rochester should explain why they should not be required to provide time and materials charges through a "menu" of specific prices for different service components (such as rates for wire mesh cages; rates for wallboard cages; cages with/without air conditioning, etc.). This would make the LECs' total cage construction and site preparation charges easier to predict from the outset. Bell Atlantic, United/Central, and Rochester should discuss whether the Commission should prescribe this method of tariffing time and materials charges.

3. Bell Atlantic and United/Central state that an estimate of charges will be provided prior to construction. After construction is completed, these LECs will reconcile estimates with the actual costs of construction and file tariffed rates based on actual costs.

(a) These LECs should describe their procedures for developing pre-construction estimates and submitting these estimates to interconnectors. For example, these LECs should address: whether estimates will be in writing; whether estimates will be itemized; how long after receiving a request for construction the LEC will submit an estimate; how long the estimate will remain valid; how an interconnector must accept an estimate; and the LEC's policies regarding payment of estimated charges. LECs should cite existing tariff provisions to support their responses.

(b) Bell Atlantic, United/Central, and interested parties should address whether LECs should be required to limit the amount they may charge interconnectors to the pre-construction estimate. Alternatively, parties should address whether LECs should be required to cap the amount they may charge interconnectors over the pre-construction estimate, *e.g.*, 10 percent.[38]

4. United/Central's tariff permits a "mutually agreed upon contractor selected by the Interconnector" to construct the cage. Parties should comment on the usefulness of this option in keeping LECs' cage construction charges just and reasonable. United/Central should provide details regarding its arrangement, such as the criteria it uses to approve contractors selected by interconnectors.

V. UNITED/CENTRAL -- ORDER TO SHOW CAUSE

21. Despite the *Suspension Order*'s directive to delete references to ICB pricing, United/Central retained a tariff provision that suggests it would develop rates for construction in response to individual customer requests.[39] Further, subsequent to the filing of its direct case, United/Central proposed an individualized rate for Teleport Communications Group that it characterized as an "individual case basis filing."[40] United/Central is hereby directed to show cause why it did not comply with our *Suspension Order* and why it should not be required to delete all references to ICB pricing in its expanded interconnection tariff.

VI. PROCEDURAL MATTERS

22. Bell Atlantic, United/Central, and Rochester (which have already been designated as parties to this proceeding) shall file their supplemental direct cases no later than June 15, 1994. The supplemental direct cases must present these

---

[36] *Expanded Interconnection Order*, 7 FCC Rcd at 7441-42.

[37] *Suspension Order*, 8 FCC Rcd at 4600.

[38] Previously, the Commission has required LECs to provide their customers with estimates of anticipated charges for expedited access orders and to cap the actual charges assessed at no more than 10 percent over such estimates. *See, e.g.*, Annual 1985 Access Tariff Filings, Phase II, 2 FCC Rcd 1416 (1987).

[39] *See* United and Central Companies, Tariff F.C.C. No. 1, Transmittal No. 1, Section 17.6 (C) (filed Feb. 15, 1994; effective Mar. 2, 1994) (provision also in earlier United and Central tariffs that were cancelled by Transmittal No. 1). That provision states in pertinent part: "When an interconnector submits a bona fide request for physical collocation ... the Telephone Company will develop the rates and charges applicable for collocation of the Interconnector's equipment and facilities at the requested location. The Telephone Company shall file the rates and charges in this tariff within 45 days' [sic] of the date of the request, to become effective upon 45 days' notice."

[40] *See* United and Central Companies, Tariff F.C.C. No. 1, Transmittal No. 244 (replaced by Transmittal No. 1, Section 17.9(C)). No petitions were filed against this transmittal, and it took effect on February 13, 1994.

carriers' positions with respect to the issue described in this Order. Pleadings responding to the supplemental direct cases may be filed no later than June 22, 1994, and must be captioned "Opposition to Supplemental Direct Case" or "Comments on Supplemental Direct Case."

23. United/Central shall file an Answer to our Order to Show Cause concurrently with its Supplemental Direct Case. That Answer shall include all information necessary to respond to the allegations and matters contained in this Order to Show Cause. United/Central may combine into one document its Answer and its Supplemental Direct Case, as long as each section is identified clearly.

24. An original and seven copies of all pleadings shall be filed with the Secretary of the Commission. In addition, parties shall file two copies of any such pleadings with the Tariff Division, Common Carrier Bureau, Room 518, 1919 M Street, N.W., Washington, D.C. 20554. Parties shall also deliver one copy of such pleadings to the Commission's commercial copying firm, International Transcription Service, 2100 M Street, N.W., Suite 140, Washington, D.C. 20037. Members of the general public who wish to express their views in an informal manner regarding the issues in this investigation may do so by submitting one copy of their comments to the Office of the Secretary, Federal Communications Commission, 1919 M Street, N.W., Room 222, Washington, D.C. 20554. Such comments should specify the docket number of this investigation.

25. All relevant and timely pleadings will be considered by the Commission. In reaching a decision, the Commission may take into account information and ideas not contained in pleadings, provided that such information is placed in the public file, and provided that the fact of reliance on such information is noted in the Order.

VII. ORDERING CLAUSES

26. IT IS ORDERED, pursuant to Sections 4(i), 4(j), 201-205, and 403 of the Communications Act, 47 U.S.C. §§ 154(i), 154(j), 201(b), 203(c), 204(a), 205, and 403, that the issue set forth in this Order IS DESIGNATED FOR INVESTIGATION.

27. IT IS FURTHER ORDERED that Bell Atlantic, United/Central, and Rochester (which have already been designated as parties to the proceeding in CC Docket 93-162) SHALL INCLUDE, in their supplemental direct cases, a response to each request for information that they are required to answer in Section IV of this Order.

28. IT IS FURTHER ORDERED that, pursuant to Sections 205(a), 4(i), 213, 218, 220, and 403 of the Communications Act, 47 U.S.C. §§ 205(a), 154(i), 213, 218, 220, 403, and Section 1.701 of the Commission's Rules, 47 C.F.R. § 1.701, that the United and Central Telephone Companies are directed to SHOW CAUSE why they should not be required to delete references to individual case base pricing in their expanded interconnection tariff.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief (Policy)
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: June 8, 1994

CITIZENS UTILITIES COMPANY FILES PETITION FOR WAIVER OF SECTIONS 61.41 AND 69.3

Pleading Cycle Established

COMMENTS: June 23, 1994
REPLY COMMENTS: June 30, 1994

On September 21, 1993, Citizens Utilities Company (CUC), on behalf of itself and its telephone operating company subsidiaries, filed a petition for waiver of Sections 61.41(c), (d) and Sections 69.3(e)(11), (i)(4) of the Commission's Rules, 47 C.F.R. §§ 61.41(c), (d) and 69.3(e)(11), (i)(4). CUC seeks to acquire approximately 8,000 access lines from telephone operating company subsidiaries of GTE Corporation (GTE) in the States of California and Oregon. CUC requests waiver of the above rule sections so its acquired properties, which are now subject to price cap regulation, may be subject to rate-of-return regulation instead. CUC also requests that these acquired properties be allowed to remain in the National Exchange Carrier Association (NECA) pools for a transitional period after which CUC will establish its own cost-based rates outside the NECA pools. According to CUC, the acquisition of these GTE properties will serve the public interest by enabling each company to focus its resources and expertise in its primary markets and thereby achieve operating efficiencies.

Interested parties may file comments on this petition for waiver no later than June 23, 1994. Replies should be filed by June 30, 1994.

An original and four copies of all comments and replies must be filed in accordance with Section 1.51(c) of the Commission's Rules, 47 C.F.R. § 1.51(c). In addition, one copy of each pleading must be filed with International Transcription Services (ITS), the Commission's duplicating contractor, at its office at 2100 M Street, N.W., Suite 140, Washington, D.C. 20037 and one copy with the Chief, Tariff Division, Room 518, 1919 M Street, N.W., Washington, D.C. 20554.

For further information, contact Andrew Mulitz or Wanda M. Harris, Tariff Division, Common Carrier Bureau, (202) 632-6917.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 94-1

In the Matter of

Price Cap Performance Review
for Local Exchange Carriers

Motion for Extension of Time and
Motion to Compel Production of Data

ORDER

Adopted: June 7, 1994; Released: June 8, 1994

By the Acting Chief, Tariff Division:

1. On May 26, 1994, Ad Hoc Telecommunications Users Committee (Ad Hoc) filed a motion for extension of time to file reply comments in the above-captioned docket. Reply comments are scheduled to be filed by June 22, 1994. Ad Hoc seeks an extension until July 6, 1994. On May 27, 1994, Ad Hoc filed a motion to compel production of supporting data from United States Telephone Association (USTA). USTA filed a response to both of Ad Hoc's motions on June 2, 1994.

2. Ad Hoc states that the volume, breadth, complexity, and diversity of the comments received on May 9, 1994, is extensive. Ad Hoc says that the local exchange carriers (LECs) produced the bulk of the comments. Ad Hoc asserts that the non-LEC reply commenters need an additional two weeks to examine and respond to the record submitted by the LECs. Ad Hoc contends that allowing a two-week extension of time could expedite the Commission's work in this proceeding.

3. Ad Hoc requests that the Commission compel USTA to provide data and results that Ad Hoc alleges were omitted from the report entitled "Productivity of the Local Telephone Operating Companies Subject to Price Cap Regulation" (Christensen Study) submitted to support USTA comments in this docket.[1] Ad Hoc contends that the omitted information is necessary to test the Christensen Study's results regarding economy-wide price and productivity conditions.

4. In response, USTA states that it promptly provided the data requested in Ad Hoc's motion to compel production of supporting data. USTA therefore claims that Ad Hoc may no longer need the requested extension of time.

5. It is the policy of the Commission that extensions of time shall not be routinely granted.[2] Further, the Common Carrier Bureau (Bureau) recently granted a two-week extension of time to file reply comments in this proceeding.[3] On the other hand, we are mindful of the commenters' need for sufficient time to produce meaningful replies, as well as the Commission's interest in reviewing a well-developed record. On balance, therefore, we find that good cause has been shown to grant all interested parties additional time, until June 29, 1994, to file reply comments, and that the brief extension of time will not impede the Commission's LEC price cap performance review. We also find that in its response, USTA submitted the data and results requested by Ad Hoc.[4] We therefore dismiss Ad Hoc's motion to compel production of supporting data as moot.

6. Accordingly, IT IS ORDERED that Ad Hoc Telecommunication Users Committee's motion for extension of time IS GRANTED TO THE EXTENT SET FORTH HEREIN, and otherwise IS DENIED.

7. IT IS FURTHER ORDERED that Ad Hoc Telecommunication Users Committee's motion to compel production of supporting data IS DISMISSED as moot.

FEDERAL COMMUNICATIONS COMMISSION

David A. Nall
Acting Chief, Tariff Division

[1] Specifically, Ad Hoc requests that the Commission direct USTA to provide (1) the annual price and quantity indexes for each of the three inputs (capital, labor, and materials), as well as for total input, (2) the annual cost shares for each of the inputs, (3) the annual price and quantity indexes for each of the seven outputs (local service, interstate end user access, interstate switched access, interstate special access, intrastate access long distance service, and miscellaneous services), as well as for total output, and (4) the annual revenue shares for each of the outputs, for each of the years 1984-1992. Ad Hoc Motion to Compel Production of Supporting Data at 1 n.3.

[2] Section 1.46(a) of the Commission's Rules, 47 C.F.R. § 1.46(a).

[3] *See* Price Cap Performance Review for Local Exchange Carriers, CC Docket No. 94-1, DA 94-534 (adopted May 23, 1994) (the Bureau granted USTA's motion for an extension of time to file reply comments until June 22, 1994).

[4] *See* USTA Response, Tables 1-4.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Complaint of Central Missouri State University against Friendship Cable of Missouri — CSR-3952-M

Request for Carriage

MEMORANDUM OPINION AND ORDER

Adopted: May 5, 1994; Released: June 15, 1994

By the Chief, Cable Services Bureau

1. On July 8, 1993, a petition on behalf of Central Missouri State University, licensee of Station KMOS-TV (Educ., Ch. 6), Sedalia, Missouri, was filed with the Commission claiming that Friendship Cable of Missouri ("Friendship"), operator of a cable television system serving Climax Springs/Coffman Bend, Missouri, had declined to carry the station, even though the Grade B contour of KMOS-TV encompases the system's principal headend at Climax Springs/Coffman Bend[1] and is therefore a "local" signal within the meaning of §5 of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992). KMOS-TV requests that the Commission not only order Friendship to carry its signal on the cable system, but also order that the system carry it on Channel 6, the channel on which it broadcasts over-the-air.

2. On August 5, 1993, Friendship filed an opposition to this complaint, in which it acknowledges that KMOS-TV meets the 1992 Cable Act's tests as a qualified NCE station, because the system is on the edge of KMOS-TV's Grade B contour and located within 50 miles of Sedalia. However, Friendship contends that KMOS-TV failed to deliver a good quality signal to its headend. It argues, therefore, that it is not required to carry KMOS-TV's signal, pursuant to §615(g)(4) of the 1992 Cable Act. In support of its contention, Friendship submits a statement by its field service engineer, Bob Green, that indicates that KMOS-TV delivers an off-air signal to Friendship's headend processing equipment at Coffman Bend that is -4dBmV(-53dBm). Accordingly, Friendship asserts that KMOS-TV does not qualify for carriage on its system serving Climax Springs/Coffman Bend, and that its request for carriage should be dismissed.

3. Friendship's objection concerning KMOS-TV's signal strength does not follow generally acceptable engineering practices to determine what constitutes a good quality signal. Although the 1992 Cable Act failed to set a standard for noncommercial educational ("NCE") stations, it did adopt a standard for determining the availability of VHF and UHF commercial stations at a cable system's headend. To establish the availability of a VHF commercial station's signal, the 1992 Cable Act set out a standard of -49dBm at a cable system's headend. A standard of -45dBm was established for UHF commercial stations signals. Since these standards address the issue of availability of a station's signal, consistent with Congress' guidance with respect to VHF and UHF commercial station availability, we see no reason not to utilize the same standards as *prima facie* tests to initially determine whether a NCE station provides a cable system with a good quality signal. Generally, if the test results for VHF stations are less than -55dBm, we believe that at least four readings must be taken over a two hour period. Where the initial readings are between -55dBm and -49dBm, inclusive, we believe that the readings should be taken over a 24-hour period, with measurements no more than four hours apart to establish reliable test results.

4. In addition to the information required by our rules to be furnished to the affected station when there is a dispute over signal level measurements,[2] cable operators are expected to employ sound engineering measurement practices. Therefore, signal strength surveys should, at a minimum, include the following: 1) specific make and model numbers of the equipment used, as well as its age and most recent date(s) of calibration;2) description(s) of the characteristics of the equipment used such as antenna ranges and radiation patterns; 3) height of the antenna above ground level and whether the antenna was properly oriented; and 4) weather conditions and time of day when the tests were done. When measured against these criteria, we conclude that the information submitted by Friendship is insufficient to demonstrate that KMOS-TV does not provide a good quality signal to the cable system's principal headend.

5. Accordingly, the complaint filed July 8, 1993, by Central Missouri State University IS GRANTED in accordance with §615(j)(3) (47 U.S.C. §535) of the Communications Act of 1934, as amended, and Friendship Cable of Missouri IS ORDERED to commence carriage of Station KMOS-TV, Sedalia, Missouri, on channel 6 on its cable television system serving Climax Springs/Coffman Bend, Missouri, forty-five (45) days from the release date of this *Order* unless Friendship submits the engineering data required herein to support its assertion of poor signal quality at its principal headend. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by §0.321 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Cable Services Bureau

[1] We note that Friendship has not provided its headend coordinates to KMOS-TV as required by §76.58(b) of the Rules, despite KMOS-TV's letter of December 23, 1992 requesting carriage. As such, we accept petitioner's conclusion that Friendship's headend for this system is located at Climax Springs, Missouri.

[2] *See* §76.61 of the Commission's Rules.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Complaint of Central Missouri State University against MW-1 CableSystems, Incorporated/USA Cablesystems, Inc.	CSR-4078-M MO0790

Request for Carriage

MEMORANDUM OPINION and ORDER

Adopted: May 5, 1994; Released: June 15, 1994

By the Chief, Cable Services Bureau:

1. On Septemer 21, 1993, a petition on behalf of Central Missouri State University, licensee of Station KMOS-TV (Educ., Ch. 6), Sedalia Missouri, was filed with the Commission claiming that MW-1 CableSystems, Incorporated/USA Cablesystems, Inc. ("MW-1") operator of a cable television system serving Chilhowee, Missouri, had declined to carry the station, even though the Grade B contour of KMOS-TV encompasses the system's principal headend at Chilhowee[1] and the station is therefore a "local" signal within the meaning of §5 of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992). KMOS-TV's requests that the Commission not only order MW-1 to carry its signal on the cable system, but also order that the system carry it on Channel 6, the channel on which it broadcasts over-the-air. No oppostion to this petition has been filed.

2. KMOS-TV's petition establishes that it is entitled to carriage on the MW-1 cable system and it has requested carriage on its over-the-air broadcast channel, as it is permited to do under §5 of the 1992 Cable Act. Since no other pleadings have been filed in this matter, the Complaint filed September 21, 1993 by Central Missouri State University IS GRANTED, in accordance with §615 (j) (3) (47 U.S.C. 535) of the Communications Act of 1934, as amended, and MW-1 CableSystems, Incorporated/USA Cablesystems, Inc. IS ORDERED to commence carriage of KMOS-TV on cable channel 6 forty-five (45) days from the release date of this *ORDER*. This action is taken by the Chief, Cable Services Bureau, pursuant to delegated authority delegated by §0.321 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson, Deputy Chief
Cable Services Bureau

[1] We note that MW-1 has not provided its headend coordinates to KMOS-TV as required by §76.58(b) of the Rules, despite KMOS-TV's letter received by MW-1 on May 15, 1993, requesting carriage. Since no opposition to KMOS-TV's complaint has been filed, we accept petitioner's conclusion that MW-1's headend for this system is located at Chilhowee, Missouri.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: June 2, 1994

COMMISSION APPLIES "PERMIT BUT DISCLOSE" EX PARTE RULES TO FORMAL COMPLAINT FILED BY BEEHIVE TELEPHONE, INC. AGAINST THE BELL OPERATING COMPANIES (E-94-57)

On April 28, 1993, the Commission's Common Carrier Bureau (Bureau) initiated an investigation, CC Docket No. 93-129, into 47 tariffs filed by various local exchange carriers (LECs) that govern the terms and conditions on which customers may obtain 800 database access services. The investigation also includes issues concerning the Service Management System (SMS) Tariff,[1] which was filed jointly by Ameritech, Bell Atlantic, BellSouth, NYNEX, Pacific Bell, Nevada Bell, Southwestern Bell and US West. It governs access by so-called "Responsible Organizations" to the SMS tariff.[2] *See 800 Data Base Access Tariffs and the 800 Service Management System Tariff, Order,* 8 FCC Rcd 3242 (Com. Car. Bur. 1993) and *Order Designating Issues for Investigation,* 8 FCC Rcd 5132 (Com. Car. Bur. 1993). Pursuant to Subsection 1.1206(b)(6)of the Commission's Rules, 47 C.F.R. § 1.1206(b)(6), the investigation into the 800 data base tariffs and the SMS tariff is a non-restricted proceeding. In conjunction with the investigation, and consistent with the Commission's *ex parte* rules providing for disclosure of permissible presentations, the staff has been engaged in discussions with certain parties for the purpose of obtaining information and exploring possible resolutions of the issues raised in the investigation. Summaries of new information provided by the parties in connection with these discussions are contained in the docket file.

On March 10, 1994, Beehive Telephone, Inc. and Beehive Telephone of Nevada, Inc. filed a formal complaint, E-94-57, against the Bell Operating Companies challenging the lawfulness of their joint SMS tariff. The tariff investigation and formal complaint involve common issues relating to the SMS tariff. Unlike the pending tariff investigation, however, the formal complaint proceeding has been restricted as specified in Subsection 1.1208(c)(1)(i)(B) of the Rules, 47 C.F.R. § 1.1208(c)(1)(i)(B).

We believe that the public interest in resolving the issues raised by the tariff investigation expeditiously would best be served by ensuring that the investigation and related discussions continue with a minimum of disruption during the pendency of the formal complaint. Because the tariff and complaint proceedings involve common issues, however, we believe that this interest must be balanced against the parties' interest in ensuring that decisions on the common issues are based upon a record available to all interested parties. In balancing these interests, pursuant to Section 1.1200(a) of the Rules, 47 C.F.R. § 1.1200(a),[3] The Bureau finds that the public interest would be served by making applicable to the formal complaint proceeding the "permit but disclose" *ex parte* rules applicable to nonrestricted proceedings. These rules permit interested parties to make *ex parte* presentations to Commission decisionmakers. Written *ex parte* communications must be filed with the Secretary while oral ex parte communications must be summarized in writing and also filed with the Secretary (with a copy to the person or persons with whom the communication was made). All *ex parte* filings should reference the appropriate file number or numbers.[4] Consistent with this Public Notice, all parties making *ex parte* presentations on the SMS tariff investigation shall file any written *ex parte* presentations and summaries of any oral *ex parte* presentations in both the investigation, CC Docket No. 93-129, and the formal complaint proceeding, File No. E-94-57. The parties to the complaint proceeding may, at their option, incorporate into the record of the complaint proceeding *ex parte* presentations that occurred in the tariff investigation after the filing of the complaint but before the issuance of this Public Notice, by filing an original plus two copies of the written communication or summary of any oral communication in accordance with Section 1.735 of the Rules pertaining to formal complaints, 47 C.F.R. § 1.735.

Copies of the formal complaint and any subsequently filed documents in both of these proceedings including *ex parte* materials, may be obtained from International Transcription Service, Room 246, 1919 M Street, N.W., Washington, D.C. or at 1250 23rd Street, N.W., Plaza Level, Washington, D.C.

For futher information, contact John Adams at (202) 632-4887 regarding the formal complaint proceeding or Thomas G. David at (202) 632-6917 regarding the tariff investigation.

By the Acting Chief, Enforcement Division and the Acting Chief, Tariff Division.

FEDERAL COMMUNICATIONS COMMISSION

---

[1] The Service Management System is a centralized database that contains all of the customer records that ultimately control the routing of 800 traffic to the appropriate interexchange carrier and end-user.

[2] Responsible Organizations or "Resporgs" are the only entities authorized to access the SMS database to enter or change customer records for 800 numbers. LECs, interexchange carriers or qualified independent entities can be Resporgs.

[3] Section 1.1200(a) permits the Commission to adopt modified or more stringent ex parte procedures in particular proceedings if the public interest so requires.

[4] *See, e.g.,* Public Notice, Commission Applies "Permit But Disclose" *Ex Parte* Rules to TRAC Complaint Proceeding, DA 88-1244(August 8, 1988).

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: June 3, 1994

PLEADING CYCLE ESTABLISHED FOR COMMENTS ON PACIFIC BELL'S PETITION FOR WAIVER OF ICLID AND BCLID ONA SERVICE REQUIREMENTS

CC DOCKET NO. 90-623
CC DOCKET NO. 88-2, PHASE I

On May 24, 1994, Pacific Bell petitioned the Commission for an indefinite waiver of the requirements to file federal and state tariffs for Caller ID services -- Calling Number Delivery (ICLID) and Bulk Caller ID (BCLID).

Pacific Bell states that when the Commission granted it relief from the structural separation requirements, the Commission also granted it a temporary waiver to delay the tariff filing requirements for Caller ID services. According to Pacific Bell, the Commission granted it a waiver for the federal tariffing of Caller ID services as well as the state tariffing of Caller ID services in California until 90 days after the Commission reached its decision in the Caller ID proceeding, CC Docket No. 91-281, released March 29, 1994. Pacific Bell's waiver expires on June 27, 1994.

Pacific Bell states that the Commission's Caller ID order created a jurisdictional conflict and that the technology does not exist to accommodate this conflict. Pacific Bell states that the Commission's order established per-call blocking as the only blocking standard available for interstate service. Pacific Bell states that the California Public Utilities Commission's order on the other hand requires that customers have their choice of three blocking options: (1) per-call blocking using *67 to enable the blocking; (2) per-line blocking; and (3) per-line blocking with the ability to unblock using a code other than *67.

Pacific Bell states that it seeks an indefinite waiver because current regulatory requirements, and the technical and economic factors make offering Caller ID services infeasible. Pacific Bell seeks an indefinite waiver until the jurisdictional conflicts and regulatory barriers are resolved. Pacific Bell states that there is no way to treat interstate and intrastate calls differently for Caller ID purposes. Pacific Bell further states that there is no way to offer different blocking options on an interstate and intrastate basis, because the necessary technology does not exist. Pacific Bell states that it has explored developing and deploying such a technology, but the cost of implementing new technology throughout their network would be at least $100 million and would not be available until 1997. Pacific Bell further states that the total cost involved in implementing two different standards to meet the different regulatory requirements could easily exceed $150 million.

Interested parties may file comments on this petition for waiver **June 15, 1994**, and reply comments by **June 22, 1994**, with the Secretary, FCC 1919 M Street, N.W., Washington, D.C. 20554. A copy should also be sent to Peggy Reitzel, Common Carrier Bureau, FCC, Room 544, 1919 M Street, N.W., Washington, D.C. 20554, and to the Commission's contractor for public service records duplication: ITS, Inc., 2100 M Street, N.W., Suite 140, Washington, D.C. 20037. Copies of the petition for waiver can be obtained from ITS, Inc. at (202) 857-3800.

We will treat this proceeding as non-restricted for purposes of the Commission's *ex parte* rules. *See generally*, 47 C.F.R. §§1.1200-1.1216. For further information contact Peggy Reitzel, Policy and Program Planning Division of the Common Carrier Bureau, at (202) 632-1300.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

CORRECTED

LETTER
May 17, 1994

Released: June 10, 1994

Ms. Rebecca L. Dorch
Bryan Cave
700 13th Street NW
Washington, D.C. 20005-3960

In reply refer to:
1800B3-DEB

In re: KDAY; Independence, CA
Benett Kessler

Petition for Reconsideration
of BMPH-921002IJ

Application BMPH-931012IK

Dear Ms. Dorch:

This letter is in response to the petition for reconsideration filed on behalf of Ms. Benett Kessler ("Kessler") on September 7, 1993 in response to the staff's August 5, 1993 letter. In that letter, the staff denied Kessler's request seeking waiver of the spacing rule, 47 CFR § 73.207, in minor change application BMPH-921002IJ and dismissed that application. The application proposed Class B facilities for unbuilt station KDAY, Independence, CA in accordance with the *Report and Order* in MM Docket 91-284, 7 FCC Rcd 1738 (1992). Subsequently, on October 12, 1993 Kessler submitted another minor change application (assigned file number BMPH-931012IK) which, if granted, would eliminate the need for the spacing waiver request.

Pursuant to 47 CFR § 73.3519(b), "where an appeal has been taken from the action of the FCC in denying a particular application, another application for the same class of broadcast station and for the same area, in whole or in part, filed by the same applicant, or his successor or assignee, will not be considered until final disposition of such appeal." Accordingly, we will first address the merits of the petition for reconsideration.

Kessler's original application BMPH-921002IJ sought use of a transmitter site atop Silver Peak, which is the presently licensed transmitter site of station KIBS (FM), Bishop, CA. From this site, KDAY would have been spaced 112.3 km from first-adjacent channel Class A station KPAH, Tonopah, NV. However, §73.207 of the Commission's rules mandates that these two stations be separated by at least 113 km. The application recognized this violation and requested that a *de minimis* spacing waiver be granted for the 0.7 km spacing deficit. In response, the staff's August 5, 1993 letter stated:

> [T]he Commission [has] ended its policy of granting spacing waivers of 47 CFR § 73.207. In lieu of granting spacing waiver requests, the Commission substituted the contour overlap provisions of 47 CFR § 73.215 as an alternate means of permitting short-spaced transmitter sites. Since the new rule's adoption, a proposal to locate at a short spaced transmitter site may *only* utilize the provisions of
>
> 47 CFR § 73.215. *See* Paragraph 33 of the *Report and Order* in MM Docket 87-121, 4 FCC Rcd 1681, 54 Fed. Reg. 09800 (1989) *as affirmed by* the *Memorandum Opinion and Order* in MM Docket 87-121, 6 FCC Rcd 5356 (1991), paragraphs 24-27.

The staff's letter therefore concluded that Kessler's request for waiver of § 73.207 could not be considered; the waiver request was denied and application BMPH-921002IJ was dismissed.[1]

The petition for reconsideration takes issue with the staff's decision. The original permit for Channel 292A was obtained by Kessler as the result of a settlement in MM Docket 90-191. That Class A permit (BPH-880519MF) permitted operation with 3 kW ERP at minus 493 meters antenna height above average terrain (HAAT). Subsequently, Kessler sought and obtained a Class B allotment in Docket 91-284. *See Report and Order*, Docket 91-284, 7 FCC Rcd 1738 (1992). The petition states that Kessler almost immediately encountered unforeseen difficulties obtaining a suitable transmitter site for station KDAY's Class B facilities. According to the petition:

> Virtually all potential elevated fully-spaced locations were under strict control of the U.S.D.A. Forest Service. Some prospective sites were expressly and strictly limited by the Forest Service to low power communications facilities, electricity was prohibited at others, and other areas were simply not available for commercial use. After an exhaustive search and complicated engineering analyses, Silver Peak was determined to be the only elevated site available for the Class B facility.

For this reason, the application requested waiver of § 73.207 to permit use of the short-spaced Silver Peak transmitter site.

The petition states, that by denying the application, the staff has delayed the institution of first local service to Independence, CA, an underserved community. Regarding *de minimis* spacing waivers, Kessler contends that the *Report and Order* in MM Docket 87-121, *supra*, nowhere explicitly states that waivers of § 73.207 will not be granted. Rather, Kessler believes that § 73.215 was established as an alternative to the spacing rules. Further, Kessler's petition argues that, through the *Notice of Proposed Rulemaking* in

[1] The staff's August 5, 1993 letter also indicated that, because the application was being dismissed for violating § 73.207, another waiver request of 47 CFR § 73.315 regarding coverage of Independence, CA by a 70 dBu field strength signal had not been evaluated. The § 73.315 waiver request was also made in conjunction with the later application BMPH-931012IK, and is essentially the same. That waiver request is addressed later in this letter.

Revision of 47 CFR § 73.208, Reference Points, and Distance Computations, MM Docket 93-226, 8 FCC Rcd 6200 (1993), "the Commission acknowledged that processing spacing waiver requests is still possible." Kessler also cites several waiver-related cases in support of this position, specifically *R&L Broadcasters*, 7 FCC Rcd 5551 (1992); *John Strelitz*, 6 FCC Rcd 497 (1991); and *Baltimore Radio Show, Inc.*, 5 FCC Rcd 3712 (1990). Kessler's petition concludes that the staff's dismissal action "without distinguishing the cited precedent or rationally explaining the basis of its action, violates the cardinal precepts of administrative law." She contends that the staff did not afford her waiver request the "hard look" called for by *WAIT Radio v. FCC*, 418 F.2d 1153 (1969), and that the dismissal without opportunity for amendment was overly harsh, as the waiver request was denied without consideration of its merits. Nor, according to Kessler, was she served with "full and explicit notice of all prerequisites for such consideration."

We do not agree with Kessler's conclusions. The plain language of Paragraph 33 of the *Report and Order* in MM Docket 87-121, 4 FCC Rcd 1681, 54 Fed. Reg. 09800 (1989), states:

> [T]hese rule changes [the adoption of the contour protection rule § 73.215] enable us to discontinue granting waivers of [47 CFR] Section 73.207 for co-channel and adjacent channel short-spacing....

Likewise, Paragraph 34 indicates:

> [I]f an applicant proposes a new short-spacing ... then the applicant must comply with the contour protection requirements with respect to that facility (footnotes omitted).

The Commission reaffirmed its position in the *Memorandum Opinion and Order* in MM Docket 87-121, 6 FCC Rcd 5356, 56 Fed. Reg. 57290 (1991), paragraphs 24 to 27, which addressed spacing waivers, including *de minimis* spacing waivers. Paragraph 27 states explicitly:

> We viewed the policy of waiving Section 73.207, even if only to permit short-spacing of a mile, as undesirable because it undermines ... the effectiveness of the distance separation table.... We do not believe that additional short-spacing waivers of Section 73.207 would generally be in the public interest where an alternative means of achieving a similar result, such as Section 73.215, is available. Therefore, we will deny requests that we reinstate consideration of Section 73.207 waivers (footnotes omitted).

No appeal of this policy was timely filed. Consequently, Kessler was on notice through both the 1989 and 1991 Federal Register publications that requests for spacing waivers of § 73.207 in applications filed after October 2, 1989 would not be considered, even for *de minimis* spacing waivers, and the underlying rationale therefore had been adequately explained. Kessler's personal lack of knowledge about the discontinuance of spacing waivers does not justify reconsideration. *See Matthew D. Wiggins, Jr.*, 1 FCC Rcd 401, 402 (1986), *citing, inter alia, Federal Crop Insurance v. Merrill*, 332 U.S. 380 (1947) ("[I]t is well settled that under 44 U.S.C. § 1507 publication in the Federal Register constitutes constructive notice of Commission processing requirements regardless of whether a particular applicant has no actual notice"). *See also Ann D. Genthner*, 1 FCC Rcd 399 (1986); *Star Signal Corporation*, 1 FCC Rcd 405, 406 (1986).

The precedents cited by Kessler's petition for the proposition that the Commission continued to grant waivers of § 73.207 even after the adoption of § 73.215 are inapposite. *R&L Broadcasters*, 7 FCC Rcd 5551, *John Strelitz*, 6 FCC Rcd 497, and *Baltimore Radio Show, Inc.*, 5 FCC Rcd 3712, each dealt with applications filed prior to October 2, 1989 -- applications which were eligible to file spacing waiver requests by virtue of their having been filed prior to the effective date of § 73.215. *See Report and Order*, MM Docket 87-121, *supra*, at paragraph 50. Kessler's application, by contrast, was filed on October 2, 1992, three years too late for consideration under the former policy.[2]

Regarding the *Notice of Proposed Rulemaking* in *MM Docket 92-226*, 8 FCC Rcd 6200, the reference to spacing waiver requests therein does not supersede the policy of discontinuing spacing waiver requests explained in MM Docket 87-121, as stated expressly in Footnote 1 of the *NPRM*. That rulemaking was limited to clarifying the procedure for the determination of spacing between two points in those instances where an applicant does not meet any of the Commission's minimum spacing requirements such as those set forth in §§ 73.213(c), 73.215(e), and 73.207 for existing short-spaced stations, or for applications filed prior to the effective date of § 73.215. It does not alter the procedures which are employed in processing applications for new short-spacings filed after the effective date of § 73.215.

Finally, we address Kessler's contention that the simultaneous denial of her spacing waiver request and the dismissal of her application without notice of the defect cited in the staff's August 25, 1993 letter was "overly harsh" and void of "fundamental fairness." On July 27, 1992, when the Commission announced that the strict "hard look" processing system for commercial FM applications was to become more lenient, it defined the policy applicable to waiver requests in the following terms:

> Our *Notice* [*of Proposed Rulemaking* in Docket 91-347, 6 FCC Rcd 7265, 56 Fed. Reg. 65721 (1991)] proposed that an applicant will not be able to cure defects resulting from the denial of a waiver request. We reasoned that an applicant's decision to file a waiver request is not an error but a conscious choice, unlike tender or acceptance defects which are usually inadvertent.... Based on the reasoning in the *Notice*, we will not permit corrective amendment of defects that result from staff denial of a waiver request. We have also decided not to consider alternatives to waiver requests supplied in the event of denial of the

[2] Kessler also notes that short-spacings of less than 0.5 km are "not cognizable" and do not require waiver of § 73.207 [or processing pursuant to § 73.213 or § 73.215]. *See, e.g.*, Footnote 10, *Report and Order*, MM Docket 87-121, *supra*. However, Kessler's proposed 0.7 km short-spacing does not fall into that category. Consequently, any policies or procedures applicable to "not cognizable" short-spacings cannot be applied to Kessler's 0.7 km short-spacing request.

> waiver.... Because consideration of waiver requests generally requires significantly more effort than the processing of routine applications, an increase in the number of waiver requests would lead to disproportionate delays in the processing of other applications. In the interest of efficient use of our limited staff resources, applicants submitting waiver requests will not be given any opportunity to cure defects resulting from denial of their waiver requests, even if the original application contains the curative information as an alternative.

Report and Order, MM Docket 91-347, 7 FCC Rcd 5074, 57 Fed. Reg. 34872 (1992), paragraph 22, *recon. denied*, 8 FCC Rcd 7572 (1993). Therefore, Kessler was on notice of the waiver processing procedures -- and of the fact that an applicant denied a waiver request would not be permitted to amend its defective proposal -- through the publication of this docket in the Federal Register. *See, e.g., Matthew J. Wiggins, Jr.*, 1 FCC Rcd at 402; *Ann D. Genthner*, 1 FCC Rcd 399; *Star Signal Corporation*, 1 FCC Rcd at 406. The staff was acting in accordance with this policy when it denied Kessler's spacing waiver request and simultaneously dismissed application BPH-921002IJ on August 25, 1993. As such, Kessler was treated no differently than other similarly situated applicants.

Based on the foregoing discussion, we find that the actions taken in the staff's August 25, 1993 letter denying the request for waiver of 47 CFR § 73.207 and dismissing application BPH-921002IJ were proper and in keeping with established and published Commission procedures. Therefore, the petition for reconsideration will be denied.

We now turn to the more recently filed minor change application BMPH-931012IK. That application seeks use of the same transmitter site (Silver Peak) specified in Kessler's previous application BPH-921002IJ, but requests processing pursuant to the contour protection rule, 47 CFR § 73.215, with respect to first-adjacent channel Class A station KPAH, Tonopah, NV. Staff study confirms that the proposal meets the minimum separation requirements of § 73.215(e) and that the directional antenna proposed provides the necessary contour protection to KPAH, in compliance with the rule. Consequently, the later application successfully avoids the deficiency which resulted in the dismissal of the previous application.

However, using the contour prediction procedures in 47 CFR § 73.313, this minor change application does not provide any 70 dBu coverage to the community of Independence, CA, as required by 47 CFR § 73.315(a). From the Silver Peak transmitter site, KDAY's 70 dBu contour is predicted to extend 27.4 km in the direction of Independence. Independence itself lies 67 km from the proposed transmitter site. Consequently, Independence lies far outside the proposed 70 dBu coverage contour of KDAY. Acknowledging this, Kessler has requested that § 73.315(a) be waived and has submitted a supplemental showing pursuant to § 73.313(e) to show that the 70 dBu contour toward Independence, as predicted by alternate contour prediction methods, is actually much larger than predicted by the Commission's methodology.

In support of this waiver request, Kessler cites the lack of alternate available elevated transmitter sites from which service can be provided to Independence. In this regard, Kessler repeats the same factors presented in its previous application BPH-921002IJ.[3] *See* Page 2, *supra*. She also stresses that, if authorized as requested, KDAY will provide a first local service to the residents of Independence, CA and the surrounding underserved "gray area". Kessler notes that Independence, a small community of 622 persons, lies in the Owens Valley, a narrow north-south valley more than 200 miles long surrounded on the east by the Inyo mountains and the Sierra Nevada range on the west. This valley carries Interstate I-395, used by approximately 5 million travellers annually. Within this valley, only Class B station KIBS, licensed to Bishop, CA, which is also located at the proposed Silver Peak transmitter site, is clearly received in Independence. Kessler contends that KIBS' programming is not oriented toward Independence or southern Inyo County. The only station whose protected service area encompasses Independence is KRHV, Big Pine, CA, which is unbuilt as of this date. No other station's predicted protected service area (including that of KIBS) approaches Independence.

The supplemental showing submitted pursuant to § 73.313(e) is provided to show the actual propagation of the 70 dBu contour toward Independence. The showing locates the proposed Silver Peak transmitter site almost due north of the community of Independence and demonstrates direct line-of-sight to the community. Because the intervening terrain is virtually all desert, with sparse vegetation, the signal is attenuated significantly less than is predicted by the standard contour prediction method in § 73.313. By using the Longley-Rice propagation model, Kessler has concluded that 79 persons (12% of the total population of 622) and 2.4 sq. km (62.6% of the area) within the legal boundaries of Independence will receive 70 dBu or better service from KDAY. All of the population and area will receive a signal strength in excess of 69.5 dBu (3.02 mV/m).[4] In addition, shadow maps provided by Kessler show that no line-of-sight obstructions exist between Silver Peak and Independence, resulting in less than average attenuation of KDAY's proposed signal. Kessler has also cited several waiver-related precedents in support of her waiver request including, *inter alia*, *Dakota-North Plains Company*, 67 FCC 2d 870, 871 (1977) (granting a waiver to an applicant providing only 68.3 dBu over the community of license); *Naguabo Broadcasting Company*, 5 FCC Rcd 2062, 2069 (ALJ 1990), *aff'd* 6 FCC Rcd 912, *aff'd in relevant part* 6 FCC Rcd 4879, 4880 n.5 (1991) (denying a waiver request to an applicant who proposed to provide a signal strength over the community of license of 49.9 dBu on the

---

[3] In application BMPH-931012IK, Kessler also adds that the proposed transmitter site protects the Owens Valley Radio Astronomy Observatory, operated by the California Institute of Technology, located just north of Big Pine, CA.

[4] Here, the supplemental showing digresses to note that in 1962, the Commission adopted the 3.16 mV/m or 70 dBu contour as defining the minimum signal strength to be placed over the community of license, replacing the earlier 3.0 mV/m (69.54 dBu) standard. *Notice of Proposed Rulemaking*, Docket 14185, 21 RR 1665, 1687 (1961); *First Report and Order*, Docket 14185, 23 RR 1801, 1824 (1962). Although the Commission made this change "for convenience," the revised standard has remained in force for almost 32 years, and has been applied to every FM commercial application since that time. We see no valid reason why the old standard should suddenly be resurrected to apply solely to the present application. We further note that even if the old standard were utilized, it would not affect the outcome reached in this decision.

ground that the proposal relied on the applicant obtaining a translator authorization to provide city coverage and thus was regarded as highly speculative): *Greater Media, Inc.*, 38 RR 2d 1542, 1544 (1976) (compliance with § 73.315(a) obtains when 50% of the measured points in the community of license receive field strengths of 3.16 mV/m (70 dBu) or greater). Considering all the factors summarized above, Kessler believes that waiver of § 73.315(a) is warranted to permit KDAY to commence operation as proposed from Silver Peak.

We have examined Kessler's waiver request in detail and conclude that we must deny it. First of all, as noted above, Kessler's application acknowledges that, even when the supplemental analysis is employed, the predicted 70 dBu contour of KDAY would only encompass 12% of the population and 62.6% of the area within the legal boundaries of Independence. The Commission's former rule requiring 100% coverage of the community of license was relaxed in *John R. Hughes, et. al.*, 50 Fed. Reg. 5679 (February 11, 1985), which stated that the community coverage requirement would be substantially complied with where at least 80% of the area within the legal boundaries of the community of license was covered by a 70 dBu or greater signal. However, Kessler's application falls far short of that relaxed requirement.

Moreover, we note that Independence, CA is not only far outside the 70 dBu community coverage contour, as predicted pursuant to the standard contour prediction method in § 73.313(e), but is located 6 km outside the 54 dBu protected contour as well. None of the cases cited by Kessler involve communities outside the protected contour of the station. Rather, the community of license in the cited cases lay between the predicted 70 dBu and the protected service contours.[5] This represents the first instance known to the staff of an applicant seeking to provide service to a community of license outside its predicted protected contour.

The minimum separation requirements in § 73.207 and the contour protection rules in § 73.215 are designed to permit minimally-spaced stations to operate with generally interference-free service within each station's protected service contour. For Class B stations, such as KDAY, the protected service contour is the 54 dBu contour. Outside of this contour, interference from other cochannel and adjacent channel stations can occur under our rules. It simply is not possible, under any rational allocations scheme, to protect FM stations to the point at which the signal is too weak to receive. Thus, the potential exists that another station could be authorized or modified which would not interfere within KDAY's 54 dBu protected service contour, but would interfere with KDAY's service to Independence, were Kessler's proposed Silver Peak operation to be implemented.[6] KDAY would have no standing to contest any interference created in this manner, since the Commission's rules do not protect any service outside the 54 dBu protected contour.[7]

The association of a broadcast station with a community of license is a basic tenet of the Commission's allocations scheme for broadcast stations. Section 307(b) of the Communications Act of 1934, 47 U.S.C. § 307(b), mandates that the "Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution to each of the same." Implicit in this statement is a recognition that the Commission must protect such service to the community of license from interference from other stations. Moreover, the community coverage rule is designed to insure that the community of license receives a premium signal. *Lester H. Allen*, 17 FCC 2d 225, 226 (1969). In the present instance, such assurance cannot be given.

Consequently, even had the supplemental showing demonstrated 70 dBu coverage of Independence (which it does not), the waiver request would not have been found to be in the public interest due to the potential loss of service to Independence at a future date. The factors cited in support of the waiver request -- lack of alternate elevated sites, first local service to an underserved area, terrain and propagation factors -- do not outweigh this potential loss. Simply put, the Commission will not authorize a broadcast station to serve a community of license located outside its protected service contour, as predicted by the standard contour prediction method in § 73.313(e), since service to that community cannot be protected from interference under our rules. Therefore, the request for waiver of 47 CFR § 73.315 will be denied.

Accordingly, in view of the foregoing, the petition for reconsideration against the August 25, 1993 dismissal of application BMPH-921002IJ IS HEREBY DENIED. In addition, the request for waiver of 47 CFR § 73.315(a) in application BMPH-931012IK IS HEREBY DENIED, and the application, being unacceptable for filing, IS HEREBY DISMISSED. These actions are being taken pursuant to 47 CFR §§ 0.283, 73.3519(b), and the policies explained in the *Report and Order*, MM Docket 91-347, 7 FCC Rcd 5074, 57 Fed. Reg. 34872 (1992), *recon. denied*, 8 FCC Rcd 7572 (1993).

Please be advised that we will expedite consideration of an application for another transmitter site in order to expedite the institution of new service to Independence, CA, consistent with the Commission's rules and policies.

---

[5] Even in *Naguabo Broadcasting Company*, *supra*, where the ALJ considered (but then rejected) a request to permit the applicant to provide only a 49.9 dBu signal over the community of license, the community of license did not lie outside the proposed station's protected service contour as predicted by the standard contour prediction method in § 73.313. Rather, the 49.9 dBu signal strength over the community of license (Naguabo, PR) resulted from a terrain obstruction not accounted for by the standard method, necessitating use of a supplemental method of signal strength prediction.

[6] This situation, were it to occur, could put KDAY's license renewal at risk from a competing applicant claiming that KDAY was not serving its community of license.

[7] § 73.215 applicants and the stations being protected by this rule are limited to use of the standard contour prediction method in § 73.313(c), (d)(2), and (d)(3), and are not permitted to use supplemental showings to show contour protection or lack thereof. *See* 47 CFR § 73.215(a)(3); *see also* the *Memorandum Opinion and Order* in MM Docket 87-121, *supra*, paragraphs 9, 12. Thus, Kessler could neither employ nor invoke a supplemental showing to prevent interference in Independence, CA (*e.g.*, by trying to show that KDAY's 54 dBu protected contour extends further than predicted by the standard contour prediction method).

Sincerely,

Linda B. Blair
Assistant Chief, Audio Services Division
Mass Media Bureau

cc: Ms. Benett Kessler
Lawrence L. Morton Associates

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 94-53

In the Matter of

Amendment of Section 73.606(b), RM-8475
Table of Allotments,
TV Broadcast Stations.
(Kailua, Hawaii)

NOTICE OF PROPOSED RULE MAKING

Adopted: June 2, 1994; Released: June 15, 1994

By the Acting Chief, Allocations Branch:

Comment Date: August 8, 1994
Reply Comment Date: August 23, 1994

1. Before the Commission for consideration is a petition for rule making filed by Paul Alfred Tennyson ("petitioner"), requesting the allotment of UHF Television Channel 50 to Kailua, Hawaii, as that community's first local television service. Petitioner states its intention to apply for the channel, if allotted.[1]

2. Petitioner notes that Kailua is a census designated place (CDP) with a 1990 population of 36,818 people, in Honolulu County (population 836,231)[2] located on the north shore of Oahu approximately 21 kilometers (13 miles) northeast of Honolulu. Petitioner submits that Kailua has its own post office, banks, a police department, hospital churches, a junior college, primary and secondary schools, shopping centers, a community center, stores, and restaurants.

3. A staff engineering analysis of the proposal indicates that UHF Television Channel 50 can be allotted to Kailua, Hawaii, consistent with the minimum distance separation requirements of Section 73.610 of the Commission's Rules.[3] Although the Commission has imposed a temporary freeze on new television allotments in certain metropolitan areas, the proposed allotment at Kailua is not affected thereby. *See Notice of Inquiry*, 2 FCC Rcd 2125 (1987) and *Order*, 52 FR 28346, July 29, 1987.

4. The Commission believes it would be in the public interest to seek comments on the proposal to amend, the TV Table of Allotments, Section 76.606(b) of the Commission 's Rules, with respect to the following community:

City	Channel No. Present	Proposed
Kailua, Hawaii	--	50

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be assigned.

6. Interested parties may file comments on or before **August 8, 1994**, and reply comments on or before **August 23, 1994** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Paul Alfred Tennyson
305 Hahani Street, #118
Kailua, Hawaii 96734 (Petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the TV Table of Allotments, Section 73.606(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

---

[1] Although the petitioner's request was signed, it failed to include an affidavit verifying that the statements contained in the petitioner were accurate to the best of its knowledge. Section 1.52 of the Commission's Rules requires that the original of any document filed with the Commission by a party not represented by counsel be signed and verified by the party and his/her address stated. In the absence of such verification, the petition may be dismissed. Section 1.401(b) of the Commission's Rules concerning rule making proceedings places petitioners on notice that their proposal must conform with the requirements of Section 1.52 regarding subscription and verification. *See also Amendment of Sections 1.420 and 73.3584 of the Commission's Rules Concerning Abuses of the Commission's Processes*, 5 FCC Rcd 3911, 3919 n.41 (1990). The petitioner is requested to rectify this omission in its comments.

[2] Population figures are taken from the 1990 U. S. Census.

[3] The proposed coordinates for Channel 50 at Kailua are North Latitude 21-24-00 and West Longitude 157-44-30.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 94-50

In the Matter of

Amendment of Section 73.202(b), RM-8458
Table of Allotments,
FM Broadcast Stations.
(Galatia, Illinois)

NOTICE OF PROPOSED RULE MAKING

Adopted: June 2, 1994; Released: June 15, 1994

By the Acting Chief, Allocations Branch:

Comment Date: August 8, 1994
Reply Comment Date: Agust 23, 1994

1. The Commission has before it the petition for rule making filed by Michael Scott Clem ("petitioner"), proposing the allotment of Channel 255A at Galatia, Illinois, as that community's first aural FM transmission service. Petitioner states its intention to apply for the channel, if allotted.[1]

2. We believe the public interest would be served by proposing the allotment of Channel 255A at Galatia, Illinois, since it could provide the community with its first aural FM transmission service. An engineering analysis has determined that Channel 255A can be allotted to Galatia in compliance with the Commission's minimum distance separation requirements with a site restriction of 0.8 kilometers (0.5 miles) northwest,[2] in order to avoid a short-spacing to the licensed site of Station WKDQ(FM), Channel 258C, Henderson, Kentucky.

3. The Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Galatia, Illinois		255A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **August 8, 1994**, and reply comments on or before **August 23, 1994**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Michael Scott Clem
P.O. Box 14
Thompsonville, Illinois 62890-0014
(Petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

---

[1] Although the petitioner's request was signed, it failed to include an affidavit verifying that the statements contained in the petition were accurate to the best of its knowledge. Section 1.52 of the Commission's Rules requires that the original of any document filed with the Commission by a party not represented by counsel be signed and verified by the party and his/her address stated. In the absence of such verification, the petition may be dismissed. Section 1.401(b) of the Commission's Rules concerning rule making proceedings places petitioners on notice that their proposal must conform with the requirements of Section 1.52 regarding subscription and verification. *See also Amendment of Sections 1.420 and 73.3584 of the Commission's Rules Concerning Abuses of the Commission's Processes*, 5 FCC Rcd 3911, 3919 n.41 (1990). The petitioner is requested to rectify this omission in its comments.

[2] The coordinates for Channel 255A at Galatia, Illlinois, are North Latitude 37-50-53 and West Longitude 88-37-10.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 94-52

In the Matter of

Amendment of Section 73.606(b), RM-8473
Table of Allotments,
TV Broadcast Stations.
(Waimanalo, Hawaii)

NOTICE OF PROPOSED RULE MAKING

Adopted: June 2, 1994; Released: June 16, 1994

By the Acting Chief, Allocations Branch:

Comment Date: August 9, 1994
Reply Comment Date: August 24, 1994

1. Before the Commission for consideration is a petition for rule making filed by Joyce Cathcart ("petitioner"), requesting the allotment of UHF Television Channel 56 to Waimanalo, Hawaii, as that community's first local television service. Petitioner states its intention to apply for the channel, if allotted.[1]

2. Petitioner notes that Waimanalo is a census designated place (CDP) with a 1990 population of 3,508. Honolulu County (population 836,231)[2] located on the north shore of Oahu approximately 17.5 kilometers (11 miles) east of Honolulu. Petitioner submits that Waimanalo has its own post office, primary and secondary schools, banks, stores and a number of churches.

3. A staff engineering analysis of the proposal indicates that UHF Television Channel 56 can be allotted to Waimanalo, Hawaii, consistent with the minimum distance separation requirements of Section 73.610 of the Commission's Rules.[3] Although the Commission has imposed a temporary freeze on new television allotments in certain metropolitan areas, the proposed allotment at Waimanalo is not affected thereby. *See Notice of Inquiry*, 2 FCC Rcd 2125 (1987) and *Order*, 52 FR 28346, July 29, 1987.

4. The Commission believes it would be in the public interest to seek comments on the proposal to amend the TV Table of Allotments, Section 73.606(b) of the Commission's Rules, with respect to the following community:

City	Channel No. Present	Proposed
Waimanalo, Hawaii	-	56

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **August 9, 1994**, and reply comments on or before **August 24, 1994**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Joyce Cathcart
1508 Halekoa Drive
Ainakoa, Hawaii 96821
(Petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the TV Table of Allotments, Section 73.606(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served

---

[1] Although the petitioner's request was signed, it failed to include an affidavit verifying that the statements contained in the petition were accurate to the best of its knowledge. Section 1.52 of the Commission's Rules requires that the original of any document filed with the Commission by a party not represented by counsel be signed and verified by the party and his/her address stated. In the absence of such verification, the petition may be dismissed. Section 1.401(b) of the Commission's Rules concerning rule making proceedings places petitioners on notice that their proposal must conform with the requirements of Section 1.52 regarding subscription and verification. *See also Amendment of Sections 1.420 and 73.3584 of the Commission's Rules Concerning Abuses of the Commission's Processes*, 5 FCC Rcd 3911, 3919 n.41 (1990). The petitioner is requested to rectify this omission in its comments.

[2] Population figures are taken from the 1990 U.S. Census.

[3] The coordinates for Channel 56 at Waimanalo are North Latitude 21-21-00 and West Longitude 157-43-12.

on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 94-51

In the Matter of

Amendment of Section 73.202(b), RM-8466
Table of Allotments,
FM Broadcast Stations.
(Mamou and Jonesville,
Louisiana)

NOTICE OF PROPOSED RULE MAKING

Adopted: June 3, 1994; Released: June 16, 1994

Comment Date: August 9, 1994
Reply Comment Date: August 24, 1994

By the Acting Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Simla B. Ellis d/b/a SoTo Broadcasting ("petitioner"), permittee for a new FM station, Channel 266A, at Mamou, Louisiana, seeking the substitution of Channel 266C3 for Channel 266A at Mamou and modification of petitioner's authorization to specify operation on the higher powered channel. In order to accommodate the upgrade at Mamou, petitioner also requests the substitution of Channel 286A for vacant Channel 266A at Jonesville, Louisiana.[1] Petitioner states that it will apply for Channel 266C3, if allotted.

2. We believe the public interest would be served by proposing the substitution of Channel 266C3 for Channel 266A at Mamou, since it could provide the community with a wide coverage area FM service. Channel 266C3 can be allotted to Mamou in compliance with the Commission's minimum distance separation requirements, provided Channel 286A is substituted for vacant Channel 266A at Jonesville, Louisiana.[2] Channel 266C3 can be allotted to Mamou with a site restriction of 12.2 kilometers (7.6 miles) east in order to accommodate petitioner's desired site.[3] As requested, we shall propose to modify the construction permit of petitioner's FM station at Mamou, Louisiana, to specify operation on Channel 266C3 in lieu of Channel 266A in accordance with Section 1.420(g) of the Commission's Rules.

3. Accordingly, we seek comments on the proposed amendment to the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the communities listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Mamou, Louisiana	266A	266C3
Jonesville, Louisiana	266A	286A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **August 9, 1994**, and reply comments on or before **August 24, 1994**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Simla B. Ellis d/b/a SoTo Broadcasting
1103 LaNeuville
Lafayette, Louisiana 70508
(Petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202)634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a

---

[1] Although petitioner's request indicates that the original copy of his proposal was signed by him, he failed to include an affidavit verifying that the statements contained in his petition were accurate to the best of his knowledge. Section 1.52 of the Commission's Rules requires that the original of any document filed with the Commission by a party not represented by counsel be signed and verified by the party and his/her address stated. In absence of such verification, the petition may be dismissed. Section 1.401(b) of the Commission's Rules concerning rule making proceedings places petitioners on notice that their proposal must conform with the requirements of Section 1.52 regarding subscription and verification. *See also Amendment of Sections 1.420 and 73.3584 of the Commission's Rules Concerning Abuses of the Commission's Processes*, 5 FCC Rcd 3911, 3919 n.41 (1990). Petitioner is requested to rectify this omission in his comments.

[2] The coordinates for Channel 286A at Jonesville are North Latitude 31-35-38 and West Longitude 91-45-23.

[3] The coordinates for Channel 266C3 at Mamou are North Latitude 30-39-42 and West Longitude 92-17-52.

request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-310

In the Matter of

Amendment of Section 73.202(b), RM-8395
Table of Allotments,
FM Broadcast Stations.
(Chester, Virginia)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: June 6, 1994; Released: June 16, 1994

By the Acting Chief, Allocations Branch:

1. At the request of Hoffman Communications, Inc. ("petitioner"), licensee of Station WDYL-FM, Channel 226A, Chester, Virginia, the Commission has before it the *Notice of Proposed Rule Making*, 9 FCC Rcd 80 (1993) proposing the substitution of Channel 289A for Channel 226A at Chester and modification of petitioner's license to specify operation on 289A. Petitioner filed comments restating its interest to apply for Channel 289A and supplemental comments. No other pleadings were received.

2. We believe the public interest would be served by substituting Channel 289A for Channel 226A at Chester since it would enable Station WDYL-FM to increase power to six kilowatts. Channel 289A can be allotted to Chester in compliance with the Commission's minimum distance separation requirements with a restriction of 4.2 kilometers (2.6 miles) northwest to accommodate petitioner's desired site.[1] As requested, we will also modify Station WDYL-FM's license to specify operation on Channel 289A.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **August 1, 1994**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Chester, Virginia	289A

4. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Hoffman Communications, Inc., for Station WDYL-FM, Chester, Virginia, IS MODIFIED to specify operation on Channel 289A in lieu of Channel 226A, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in Station WDYL-FM's license (BLH-880520KB), except the channel as specified above. Any other changes, except those so specified under Section 73.1690 of the Rules, require prior authorization pursuant to an application for construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with license BLH-880520KB, except for the channel as specified above and a license application (FCC Form 302) is filed within 10 days of commencement of program tests.

5. IT IS FURTHER ORDERED, That the Secretary shall send a copy of this *Report and Order* by Certified Mail, Return Receipt Requested, to the licensee, as follows: David M Silverman, Esq., Cole, Raywid & Braverman, 1919 Pennsylvania Avenue, N.W., Suite 200, Washington, D.C. 20006 (Counsel for petitioner).

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Acting Chief, Allocations
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 289A at Chester are North Latitude 37-23-11 and West Longitude 77-28-26.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-291

In the Matter of

Amendment of Section 73.202(b), RM-8133
Table of Allotments,
FM Broadcast Stations.
(Cambridge and St. Michaels,
Maryland)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: June 8, 1994; Released: June 17, 1994

By the Acting Chief, Allocations Branch:

1. Pursuant to the request of C. W. A. Broadcasting ("CWA), the Commission has before it for consideration the *Notice of Proposed Rule Making*, 7 FCC Rcd 8545 (1992), proposing the reallotment of Channel 232A from Cambridge, Maryland, to St. Michaels, Maryland, and modification of Station WFBR(FM)'s construction permit to specify St. Michaels, Maryland, as its community of license. CWA filed comments restating its intention to implement the change.[1] Prettyman Broadcasting Company ("Prettyman Broadcasting") filed opposing comments. CWA and Prettyman filed reply comments.

2. Prettyman Broadcasting, licensee of Station WICO-FM, Salisbury, Maryland, opposes the reallotment of Channel 232A to St. Michaels, contending that such action not only compromises the integrity of the allocation process but would adversely affect other licensees and Cambridge residents.[2] Prettyman Broadcasting argues that, in almost two years, CWA failed to make any progress towards the construction of an FM facility in Cambridge and now proposes to reallot Channel 232A to St. Michaels, a community significantly smaller than Cambridge already receiving city grade service from eight radio stations.[3] Prettyman Broadcasting expresses concern that some of CWA's recent actions cast serious doubts on whether it will be able to fulfill its obligation to construct an FM facility and reimburse Prettyman Broadcasting for expenses associated with changing WICO-FM's channel. Prettyman Broadcasting requests that CWA be instructed to re-certify its ability to reimburse Prettyman Broadcasting. Further, Prettyman Broadcasting respectfully requests that should the proposed allotment be rejected, that it be released from its obligation to change frequencies at Salisbury.

3. We shall deny Prettyman Broadcasting's request to be released from its obligation to change its frequency. That request is premature. The *Report and Order* in MM Docket 84-1043 ordered Prettyman Broadcasting to change its channel from 232A to 248A to accommodate the allotment of Channel 232A at Cambridge. CWA holds a construction permit for Channel 232A at Cambridge and has stated its willingness to reimburse Prettyman Broadcasting for its expenses for changing channels. In the event CWA proves unwilling or unable to discharge its obligation and no applicant for the vacant allotment undertakes to reimburse Prettyman Broadcasting, the Commission will at that time, entertain a request to release Prettyman Broadcasting from its obligation to change frequency.

4. Upon further review of this proposal, we concluded that it cannot be adopted consistent with Commission requirements. In adopting a procedure for the modification of FM stations to a new community of license, the Commission specifically stated that it would be concerned "if a situation were to arise where a licensee or permittee proposed to change its community of license, and that licensee or permittee had received in a comparative hearing a decisionally significant preference that would not have been granted had the comparative contest been for a station at the new proposed community." *Memorandum Opinion and Order on Reconsideration* in MM Docket 88-526, 5 FCC Rcd 7094, 7097 (1990). The Commission noted that a number of qualitative enhancements in the comparative process have a particular nexus with the community of license. Recognizing the potential for subversion of the comparative process, the Commission placed the burden on petitioners to address this concern. *Id.* The petitioner in this case falls squarely within the Commission's requirements. CWA was granted a construction permit for Channel 232A at Cambridge as a result of prevailing in a comparative hearing in which the Administrative Law Judge awarded it, "a decisive 100% integration credit, enhanced by minority ownership, and past civic activities within the service area." *See Big Bay Broadcasting*, 4 FCC Rcd 4676, 4686 (1989). CWA has not addressed this issue.[4]

---

[1] In response to the *Notice*, petitioner also provided an affidavit verifying the statements in the petition.

[2] Station WICO-FM was ordered to operate on Channel 248A in MM Docket 84-1043. *See* 50 FR 34466, August 26, 1985. The channel substitution at Salisbury was made to accommodate the allotment of Channel 232A at Cambridge. The *Report and Order* in that proceeding indicated that the ultimate permittee of FM Channel 232A at Cambridge was responsible for reimbursement for the expenses incurred by Station WICO-FM in changing channels. The construction permit for Station WFBR(FM), Cambridge, is conditioned on Station WICO-FM changing channels. On September 19, 1986, Prettyman Broadcasting was granted permission from the FCC to continue WICO-FM's operations on Channel 232A until a permittee at Cambridge initiated program tests. *See Letter from Charles Schott, Chief, Policy and Rules Division*, dated September 19, 1986.

[3] CWA was granted a construction permit for Channel 232A on June 20, 1990 (BPH-851028MJ) and has filed a third extension request (BMPH-930601JB).

[4] We note that although CWA has demonstrated that zoning difficulties render its presently authorized site unavailable, it has not demonstrated that this is the only usable site for Channel 232A in Cambridge. Therefore, we need not address whether the Commission's decision in *Pinkeyville, IL*, 41 RR 2d 69, 71 (1977), *Blackshear, Richmond Hill, and Folkston, Georgia*, 2 FCC Rcd 3323 (1987), *Valley Springs, California*, 2 FCC Rcd 2036 (1987), and *Wadley and Dadeville, Alabama*, 60 RR 2d 1462 (1986), are applicable.

5. Accordingly, based on the above discussion, IT IS ORDERED, That the petition for rule making submitted by C. W. A. Broadcasting for the reallotment of Channel 232A from Cambridge, Maryland, to St. Michaels, Maryland, IS DISMISSED.[5]

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[5] The dismissal of this proposal makes no determination on St. Michael's requirements for allotment of an FM channel nor does it preclude CWA from requesting a change of community once it has been on the air in Cambridge for a period of one year or more.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-284

In the Matter of

Amendment of Section 73.202(b),	RM-8375
Table of Allotments,	
FM Broadcast Stations,	
(Woodville, Mississippi and	
Clayton, Louisiana)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: June 8, 1994; Released: June 17, 1994

By the Acting Chief, Allocations Branch:

1. At the request of PDB Broadcasting ("petitioner"), permittee of a new FM station, Channel 299A, Woodville, Mississippi, the Commission has before it the *Notice of Proposed Rule Making*, 8 FCC Rcd 8152 (1993), proposing the substitution of Channel 299C3 for Channel 299A and modification of petitioner's authorization to specify operation on the higher powered channel. In order to accommodate the proposal to upgrade at Woodville, petitioner also requested the deletion of vacant Channel 300A at Clayton, Louisiana. Petitioner filed a statement.[1] Gary Albarez and Keith Frederick d/b/a Clayton FM Partnership ("Clayton Partnership"), filed opposing comments, as well as reply comments.

2. Our *Notice* proposing the upgrade at Woodville and the deletion of Channel 300A at Clayton was premised on the fact that the Commission had not received an acceptable application for Channel 300A at Clayton. However, in response to our *Notice* Clayton Partnership has filed an application for Channel 300A at Clayton, Louisiana. As stated in our *Notice* it is Commission policy not to delete a channel in which interest has been expressed. Since an expression of interest has been filed, the basis for the deletion of Channel 300A is no longer valid. Inasmuch, as the allotment of Channel 299C3 at Woodville was contingent upon the deletion of Channel 300A at Clayton, we are compelled to deny petitioner's proposal.

3. Accordingly, pursuant to the authority contained in Section 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That the petition for rule making filed by PDB Broadcasting (RM-8375), IS DENIED.

4. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

5. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] As stated in the *Notice*, petitioner's request, although signed, failed to include an affidavit verifying statements contained in its petition, as required by Section 1.52 of the Commission's Rules. Petitioner was requested to correct the deficiency in its responsive comments, and has complied accordingly by filing a statement. Nevertheless, petitioner has failed to file comments restating its interest to apply for Channel 299C3 at Woodville. The *Notice* stated, a showing of continuing interest is required before a channel will be allotted. However, this issue need not be addressed, given our resolution of this proceeding.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-265

In re Application of

PINE TREE MEDIA, INC. File No. BR-900817UF

For Renewal of License of
Station KARW
Longview, Texas

MEMORANDUM OPINION AND ORDER

Adopted: June 7, 1994; Released: June 17, 1994

By the Review Board: MARINO (Chairman) and GREENE.

1. Before the Review Board are two Appeals of Praise Media, Inc. to the *Memorandum Opinion and Order* of Administrative Law Judge John M. Frysiak, FCC 94M-90, released February 24, 1994 (*MO&O*). The first appeal, filed March 3, 1994 pursuant to 47 CFR 1.301, is to the ALJ's denial of Praise's Petition to Accept Late-filed Notice of Appearance and his ruling that Praise is not a successor or assign of Pine Tree Media, Inc. for purposes of participating in the above-captioned proceeding. (Appeal I.) This was opposed by the Commission's Mass Media Bureau on March 21, 1994 (First Opposition). The second appeal, filed March 28, 1994 pursuant to 47 CFR 1.302,[1] is to the ALJ's dismissal of the KARW renewal application and his termination of the proceeding. (Appeal II.)[2] This was opposed by the Mass Media Bureau on April 11, 1994 (Second Opposition). Praise filed a reply on April 26, 1994. The Board has received no pleading whatever from Pine Tree Media, Inc., the KARW licensee and putative renewal applicant. Because Praise's dual appeals are rooted in the ALJ's denial of party status to Praise and the consequent termination of the proceeding for lack of an appearance by a party, we will treat the appeals together.

BACKGROUND

2. This proceeding was initiated by *Hearing Designation Order and Notice of Forfeiture*, 8 FCC Rcd 7591 (1993) (*HDO*), to determine whether the application of Pine Tree Media, Inc. for renewal of the KARW license should be granted. The *HDO* specified the following additional issues for making this determination:

1. To determine whether one or more unauthorized transfers of control of Pine Tree Media, Inc. occurred in violation of Section 310(d) of the Communications Act of 1934, as amended, and Section 73.3540 and/or Section 73.3541 of the Commission's Rules.

2. To determine whether Pine Tree Media, Inc. and/or persons acting on its behalf misrepresented facts in the station's 1990 renewal application.

3. To determine whether Pine Tree Media, Inc. and/or persons acting on its behalf violated Section 73.1015 of the Commission's Rules by failing to respond fully to Commission correspondence dated September 9, 1992, September 23, 1992, December 3, 1992, and/or February 10, 1993.

4. To determine whether Station KARW is in compliance with the following Commission rules: Section 1.1307(b) (environmental assessment); Sections 17.21 through 17.23 (tower painting); Section 73.932 (emergency broadcast equipment); 73.1745(a) (transmitter power); Sections 73.1800 and 73.1820 (station logs); and 73.3526 (public file).

The *HDO* placed the burdens of proceeding and proof "upon Pine Tree Media, Inc., its successors or assigns and/or those persons now in control of Pine Tree Media, Inc., as appropriate." 8 FCC Rcd at 7593 ¶ 16. Because Pine Tree was suspected of committing, *inter alia*, an unauthorized transfer of control, the *HDO* conferred party status on "American Plastics, H. E. Ferrell and Robert D. Murray," *id.* ¶ 17, the possible transferees known to the Commission from an earlier station inspection. *See id.* at 7591 ¶ ¶ 4-5. The *HDO* then ordered "Pine Tree Media, Inc., its successors and assigns, American Plastics, H. E. Ferrell and Robert D. Murray" to file a notice of appearance stating their intention to participate within twenty days of the mailing of the *HDO*. *Id.* at 7593 ¶ 18. It also ordered that "Pine Tree Media, Inc., its successors and assigns and/or those persons now in control of Station KARW" publish notice of the hearing. *Id* ¶ 19. The *HDO* was released October 25, 1993.

3. Neither the licensee itself nor the specifically identified parties ever filed a notice of appearance, and none has been heard from by the Commission. However, a Mesquite, Texas attorney, Kenneth Kilgore, sent a letter dated November 12, 1993 to Bureau counsel and the Chief Administrative Law Judge -- but not the Commission Secretary -- stating, "Enclosed for filing is our Notice of Participation and Intervention." *MO&O* at 1 n.1. The attached notice "was submitted on behalf of Janet Washington who claimed an interest in the license and the real property on which KARW operates." *Id.* Despite the absence of any notice of appearance from either the licensee or the suspected transferee(s) identified in the *HDO*, the ALJ scheduled a prehearing conference on January 11, 1994. No one appeared on behalf of Pine Tree, and according to the Bureau, "The Presiding Judge, with the agreement of the Bureau, reset the conference date for January 24, 1994, after noting that he had received a call from Janet Washington who had requested the postponement so that she could retain counsel." First Opposition at 2.

---

[1] Notice of Appeal was given March 7, 1994.

[2] The Commission's rules differentiate between appeals of denial of party status (47 CFR 1.301) and appeals of the termination of a proceeding (47 CFR 1.302) and provide different filing procedures and periods. Thus, Praise filed two appeals. Appeal II at 1 n.1.

4. No one appeared on behalf of Pine Tree or the other named parties at the January 24 prehearing conference. *See* tr. 7. Instead, a prominent communications attorney identified himself and said:

> Your Honor, my name is Alan Campbell of the firm Irwin, Campbell & Crowe. I'm representing today an entity known as Praise Media -- who is not named in the parties of the proceeding, and I have not filed a motion to intervene or otherwise participate at this point, Your Honor. I was just been retained by that company at the end of last week.

Id. When the ALJ asked for an appearance for Pine Tree, counsel explained:

> Your Honor, I do not represent Pine Tree. The order references Pine Tree, its accessors [sic] and assigns. My client, Praise Media, may be qualified as an acc--, and to Pine Tree, but I do not know yet, until I have an opportunity to gather more facts.

Id. When asked about the notice of appearance filed by Kenneth Kilgore, Mr. Campbell claimed to be unaware of either Mr. Kilgore or the notice. Tr. 8.[3] Bureau counsel stated the Bureau's intention to file a motion to dismiss because Pine Tree had neither filed a notice of appearance nor appeared at the prehearing conference. Tr. 9. In response Mr. Campbell said:

> My anticipation is that long before the deadline for filing an opposition to [the Bureau's] motion I would know the facts of the case enough to come in with the understandable opposition, intervention, appearance or whatever it would be and hopefully be in a-- ability to explain to the Commission exactly what has occurred down there. So, I'm sure it's confusing to you and it's confusing to me at this time because of the recent -- being retained by Praise Media.

Tr. 10. He added at tr. 10-11:

> I'm here somewhat as a -- I don't know if interloper is a legal title or not, but I'm not a participant today, I understand that.

5. As promised, on January 26, 1994, the Bureau filed a motion to dismiss the Pine Tree renewal application for failure to prosecute. Praise opposed the motion on February 8, and at the same time filed a Petition to Accept Late-Filed Notice of Appearance and a Notice of Appearance. *MO&O* at 1; Appeal I at 2. The Bureau replied on February 15, opposing the appearance of Praise. After considering these pleadings, the ALJ denied Praise's request to appear, granted the Bureau's motion to dismiss, and terminated the proceeding. He concluded that Praise had failed to establish itself as the successor or assign of Pine Tree because, first, Praise did not appear to have closed on its claimed purchase of KARW; and, second, Praise did not appear to have sought or received Commission approval for any transfer of KARW. *MO&O* at 2.

PLEADINGS

6. Both before the ALJ and now before the Board, Praise has argued that it is a successor and assign of Pine Tree and, therefore, entitled to intervene. Praise's claim is based on a February 10, 1992 Memorandum between Herbert Wren and Earl Jones, Jr. as seller and Eugene Washington and Ray Lee Williams, acting respectively as President and Vice President of Praise, as buyer. This Memorandum provides:

> WHEREAS, . . . [Wren and Jones] have this day conveyed unto PRAISE MEDIA, INC., a Texas corporation, hereinafter referred to as "BUYER", certain real and personal properties comprising the Radio Station located at 2929 Signal Hill Road, Longview, Texas 75603; and,
>
> * * *
>
> NOW, THEREFORE, IT IS STIPULATED AND AGREED by and between the undersigned as follows:
>
> 1) Seller hereby assigns unto Buyer all of Seller's right, title and interest in and to the corporation known as "PINE TREE MEDIA, INC." and any Federal Communications Commission Operator's License associated with the Radio Station at 2929 Signal Hill Road, Longview, Texas 75603;
>
> 2) Buyer agrees that any expense involved in transferring such license, including without limitation, application fees and attorney's fees, shall be borne exclusively by Buyer; and,
>
> 3) Buyer acknowledges that Seller is not warranting the transferability of such license but agrees to execute any documents necessary to effect such transfer.

Appeal I, Exh. 5. This Memorandum was accompanied by the following documents executed on February 10, 1992: Warranty Deed, Deed of Trust, Vendor's Lien Note, Bill of Sale, and Security Agreement.[4] Appeal I at 3 and Exh. 5. According to Praise, "These documents constituted both the agreement between the parties and the consummation of that agreement." Appeal I at 3. *See* March 3, 1994 Affidavit of Janet Washington, who identified herself as "General Manager of AM radio station KARW, Longview, Texas, and Treasurer of Praise Media, Inc." Appeal I, Exh. 6. Ms. Washington affirmed in her Affidavit:

> Praise Media, Inc., which was not represented by legal counsel at the time these documents were prepared and executed, not only entered into the agreement to purchase station KARW on February 10,

[3] Nothing further has been heard from Mr. Kilgore.

[4] In addition to real and personal property, the Security Agreement provides for the following collateral: "All right, title and interest now owned or hereafter acquired by Debtor in and to any Federal Communication [sic] Commission Operator's license for the Radio Station located at 2929 Signal Hill Road, Longview, Texas 75603." Exh. "A" to Security Agreement, Appeal I, Exh. 5.

> 1992, but also consummated the purchase of the station on that date. It was Praise Media's understanding at that time that the sale of the station could be consummated prior to requesting approval of the license transfer.

7. According to Praise, the interest Wren and Jones sold to Praise came about through a series of transactions, foreclosures and repossessions that started with Wren and Jones' ownership of Pine Tree and their 1988 transfer of control of Pine Tree to one Kenneth Tuck. *HDO*, 8 FCC Rcd at 7591 ¶ 2. The Commission authorized this transfer. Tuck never filed the required ownership report with the Commission to confirm consummation of the transfer, *id.* at n.2, but he made a promissory note to Wren and Jones "in payment for station KARW and/or the stock in Pine Tree." Appeal I at 3. Tuck died in May 1990 and, on May 17, 1990, the note held by Wren and Jones was transferred to a company known as American Plastic Products, Inc. *HDO* at 7591 ¶ 4; Appeal I at 3. Praise further explained at Appeal I at 3 (citations to exhibits omitted):

> American Plastics foreclosed on the assets securing that note on or about July 3, 1990. The assets securing the note included the real and personal property associated with the station and the stock of Pine Tree.
>
> On August 6, 1991, Wren and Jones foreclosed on a note issued to them by American Plastics and thereby reacquired the assets securing that note, including the stock of Pine Tree and the real and personal property associated with the station.

The note issued by American Plastics included 10,000 shares of Pine Tree common stock as collateral. Appeal I, Exh. 4.[5] The sale to Praise followed from this foreclosure against American Plastics. According to Praise, the Memorandum evidencing its purchase provides:

> Praise has acquired all right and title to the assets of station KARW to which Wren and Jones had an interest, along with any interest Wren and Jones had in Pine Tree and the license for KARW. As described above, the interest in KARW transferred by Wren and Jones can be traced directly to Pine Tree and Tuck, thus clearly establishing Praise as Pine Tree's successor and assign.

Appeal I at 4.

8. Having traced the station's Pine Tree lineage back to Wren and Jones and their first buyer, Tuck, Praise is claiming the right to intervene in this renewal hearing as a "successor or assign" of Pine Tree. As to the fact that no application to assign the license to Praise had, or has, ever been filed, Praise is submitting that the *HDO* is expressly directed to Pine Tree or its "successors and assigns." *See* Appeal I at 5. Indeed, it said in Appeal II, at 5 (emphasis in original): "The *HDO*, recognizing that the facts available to the Commission indicated that transfers of control may have occurred and that no applications to approve these transfers had been filed, demanded an appearance from Pine Tree *'or its successors and assigns.'*" Further, "it stands to reason that the Commission would not have demanded the appearance of successors and assigns if it had not intended to grant party status to such entities whether or not FCC applications to assign or transfer control had been filed. Thus, the *HDO* clearly requires the participation of successors and assigns whether or not applications to assign or transfer control have been filed." *Id.* at 6. "[H]aving demonstrated its ownership of the station by contract law," Praise argues that the ALJ erred in denying it intervention rights (and terminating the KARW license renewal hearing) and that "the *HDO*'s requirement that 'successors and assigns' of Pine Tree enter an appearance is frustrated." Appeal I at 5; *see* Appeal II at 6.

9. The Bureau, in advocating denial of Praise's appeals, stated the procedural difficulties with the case, *i.e.*, Praise's failure to file the November 12, 1993 notice of appearance with the Commission's Secretary and its failure to enter an appearance at either prehearing conference. It is viewing Janet Washington, on whose behalf the November notice was submitted, "not only was a stranger to this proceeding, but also to the Commission." First Opposition at 4. As to Praise's asserted right to participate regardless of the lack of any Commission authorization, it said at *id.*:

> Absent Commission approval of an assignment or transfer application, Praise Media has no entitlement to the KARW authorization and no right to prosecute Pine Tree's renewal application. At best all that transferred was the real and personal property of Pine Tree. This is insufficient to establish Praise Media as a successor or assign of Pine Tree.

In opposing Praise's second appeal, the Bureau is interpreting the *HDO* language about successors and assigns to limit participation only to putative successors known to the Commission at the time the *HDO* was issued. "Assuming an assignment application had been filed and granted," the possible successors could only be the heirs of the deceased Tuck "or perhaps American Plastics, which was the apparent successor to a note held by Tuck." Second Opposition at 3. "Moreover," according to the Bureau, "the *HDO* limits the filing of a notice of appearance by those currently operating the station to those granted party status, American Plastics, and/or H. E. Ferrell and Robert Dub Murray. Praise Media is not included in this list." *Id.* at 3-4. Because Praise was not granted party status in the *HDO*, the Bureau is arguing tautologically that Praise has no standing here to file a notice of appearance.

---

[5] It was during the American Plastics tenure that the Commission inspected the station and became aware of a possible unauthorized transfer of control involving American Plastics and Messrs. Ferrell and Murray, who appeared to be operating the station on behalf of American Plastics. *See HDO*, 8 FCC Rcd at 7591 ¶ 4. There is no indication in the *HDO* that the Commission was aware that the station was later being operated by persons connected with Praise until the November 1993 notice from Praise and the pleadings before the ALJ. Praise admits that, "[i]nsofar as the Commission records are concerned, there are no applications or reports concerning these foreclosures and repossessions." Appeal I at 3 n.1. The Commission acknowledged, however, that someone other than American Plastics might have taken over control of the station. *See HDO*, 8 FCC Rcd at 7592 ¶ 8 and discussion at ¶ 12, *infra*.

10. In reply to the Bureau's Second Opposition, Praise is arguing that the Bureau's reasoning would rob the Commission's requirement that successors and assigns file appearances of any meaning or practical effect. It is further arguing that limiting participation only to those named in the *HDO* or Tuck's heirs is inconsistent with the *HDO*'s acknowledgement that unnamed others may be in control.

DISCUSSION

11. *Party in Interest.* The question of Praise's right to party status turns on whether Praise is a party in interest to the KARW renewal application. Title 47 CFR 1.223(a) specifically provides an opportunity for those *not* named as parties but who qualify as a party in interest to seek intervention, and further provides: "Where the person's status as a party in interest is established, the petition to intervene will be granted." This is fully consistent with both the Communications Act requirement that any hearing "shall be a full hearing in which the applicant and all other parties in interest shall be permitted to participate." 47 U.S.C. § 309(e). This is also fully consistent with the Administrative Procedure Act requirement that the agency "shall give all interested parties" an opportunity to participate in agency adjudications "when time, the nature of the proceeding, and the public interest permit." 5 U.S.C. § 554(c). Had the *HDO* addressed Praise's involvement with KARW and denied it party status, the *HDO* resolution would be controlling for the Board lacks authority to review matters discussed therein. *See Lion's Share Broadcasting*, 8 FCC Rcd 8423, 8423 ¶ 3 (Rev. Bd. 1993); *Ft. Collins Telecasters*, 103 FCC 2d 978, 984-85 ¶ 7 (Rev. Bd. 1986), *rev. denied*, 2 FCC Rcd 2780 (1987), *aff'd by judgment*, 841 F.2d 428 (D.C. Cir. 1988). But, the *HDO*'s silence with respect to Praise's status would seem to reflect the Commission's unawareness of Praise's claimed succession to KARW's ownership or its asserted role as the current station operator. In these circumstances we can find no guidance from the *HDO*'s failure to designate Praise and must reject the Bureau's point to the contrary.

12. Likewise, we must reject the Bureau's counterpoint, that Praise's asserted interest is unauthorized and not even the subject of an application. American Plastics stood in precisely the position now held by Praise, *i.e.*, purported acquisitor of an interest from Pine Tree's creditors and former owners, Wren and Jones, without benefit of prior Commission authorization, and it was named a party by the *HDO*. But, at the same time it named American Plastics a party because its representatives, Ferrell and Murphy, appeared to be operating the station when Commission personnel conducted an inspection, *HDO*, 8 FCC Rcd at 7591 ¶ 4, the Commission acknowledged in the *HDO* that its information was not current. Beginning with a letter in September 1992, the Commission, *inter alia*, "endeavored to ascertain the identity of the persons operating the station in order to determine whether an unauthorized transfer of control had occurred" in violation of the Communications Act or the Commission's rules. *Id.* ¶ 5. It finally received an unsigned written response on January 26, 1993, indicating that "Ferrell and Murphy no longer managed the station. However, the response did not identify who does control the station or how they came to acquire such control." *Id.* at 7592 ¶ 8. It is within that context that the Commission designated issues to determine "whether one or more unauthorized transfers of control of Pine Tree Media, Inc. occurred," and whether Pine Tree "and/or persons acting on its behalf" misrepresented facts in the renewal application and failed to respond fully to Commission correspondence. *Id.* ¶ 13. It is also within that context that the Commission placed the burdens of proceeding and proof on "Pine Tree Media, Inc., its successors or assigns and/or those persons now in control of Pine Tree Media, Inc., as appropriate." *Id.* at 7593 ¶ 16 . It is also within that context that the Commission directed Pine Tree *and* "its successors and assigns" to file notices of appearance. *Id.* ¶ 18. Finally, it is within that context that the Commission ordered "Pine Tree Media, Inc., its successor and assigns and/or those persons now in control of Station KARW" to publish notice of the hearing. *Id.* ¶ 19.

13. Praise has established a colorable claim as the successor or assign of Pine Tree under contract law, even if not under the law governing the assignment and transfer of stations before the Commission. Its documentary exhibits show a succession of transactions by which Wren and Jones sold, repossessed, and resold the station and its assets, including Pine Tree stock, ultimately to Praise who produced a bill of sale and the Memorandum described *supra*, ¶ 6, as well as additional documents giving a security interest to Wren and Jones in the station property and purportedly in the license as well. *See* Exh. "A" to Security Agreement, Appeal I, Exh. 5. Janet Washington has twice declared under penalty of perjury that Praise bought the station from Wren and Jones on February 10, 1992 and that she is the General Manager. March 3, 1994 Affidavit, Appeal I, Exh. 6; March 28, 1994 Affidavit, Appeal II, Exh. 6. At stake, then, is Praise's investment in the station, which establishes a direct economic interest in the outcome of the proceeding. Whether or not the parties to these contract transactions secured the appropriate Commission authorizations, and the effect on the pending KARW renewal application if they did not, are questions at issue under the *HDO*.[6] These should not be prejudged in the guise of denying party status to one who claims to hold Pine Tree's interest in KARW and has a substantial direct economic interest in the outcome, which will be adversely affected if Praise is not made a party to the proceeding. This is sufficient to establish Praise's right to participate as a party in interest. *See generally Minnesota Microwave, Inc.*, 1 RR 2d 928, 929 ¶ 2 (Rev. Bd. 1964). In addition, Praise has information relevant to all but, perhaps, the misrepresentation issue. The novelty here is that the entity last authorized by the Commission to hold control of the KARW license died before the renewal application was filed in its behalf, but this was known to the Commission when it issued the *HDO* ordering appearances from Pine Tree and its successors and assigns and ordering both "successors or assigns *and/or* those persons now in control of Pine Tree Media, Inc." to meet the burdens of proceeding and proof. *HDO* at 7593 ¶ ¶16 , 18 (emphasis added).

[6] *Cf. Silver Star Communications-Albany, Inc.*, 6 FCC Rcd 6905, 6906-07, 6908 n.8 (1991) (unauthorized transfer of control not *per se* disqualifying; in light of FCC decision not to revoke licenses because of unauthorized transfer, future assignment application/s of licensee were to be routinely processed).

14. *Procedural Issues.* In addition to its arguments discussed above, that Praise could not enter a notice of appearance without prior Commission approval of its status through either mention in the *HDO* or action on an assignment or transfer application, the Bureau recited incidents of Praise's asserted failure to comply with the *HDO*'s appearance requirement.[7] The Bureau stated that Praise improperly directed its November 12, 1993 Notice of Appearance and twice failed to appear at prehearing conferences. But, the Bureau admits that Janet Washington had asked the ALJ for a postponement of the first prehearing conference on Praise's behalf and the Bureau had agreed. *See* ¶ 3, *supra;* First Opposition at 2. Praise was represented at the second prehearing conference by newly-hired counsel who needed more time to gather facts about Praise's status before entering a formal appearance on Praise's behalf. *See* ¶ 4, *supra.* Nonetheless, counsel agreed to procedural dates with the Bureau and completed his review and response to the Bureau's motion to dismiss without seeking additional time and filed a notice of appearance and request for acceptance within that time.

15. The ALJ's rationale for denying Praise's participation was his mistaken view that Praise had not sufficiently established itself as Pine Tree's successor or assign. In that context he said, "To date, no notice appearance has been filed by Pine Tree or its successors and assigns," and concluded that Praise cannot be a party in interest without prior Commission approval of its application. *MO&O* at 1-2 and n.1. His ruling was not based on any finding that Praise had engaged in "the sort of inexcusable or contumacious behavior" that warranted dismissal for failure to prosecute in *Innovative Women's Media Ass'n v. FCC*, 16 F.3d 1287, 1289-90 (D.C. Cir. 1994), or any weighing of the standards for dismissal in *Comuni-Centre Broadcasting, Inc. v. FCC*, 856 F.2d 1551, 1554 (D.C. Cir. 1988).[8] This Board will not expand the ALJ's ruling by characterizing Praise's imperfect efforts to make its interest known as either inexcusable or contumacious and elevating the procedural deficiencies here to an independent basis for denying Praise's request to appear.

16. ACCORDINGLY, IT IS ORDERED That the Appeals of Praise Media, Inc. filed March 3 and March 28, 1994 ARE GRANTED; and That this proceeding IS REMANDED to the Presiding Officer.

FEDERAL COMMUNICATIONS COMMISSION

Marjorie Reed Greene

Member, Review Board

[7] The Bureau sought permission to file its First Opposition one day late. First Opposition at 1 n.1. Praise correctly notes that the Bureau's opposition to its appeal under 47 CFR 1.301 was significantly more than one day late. Oppositions to appeals under 1.301(a)(1), "shall be filed within 5 days after the appeal is filed." 47 CFR 1.301(c)(7). Pursuant to the Commission's rule for computing the terminal time for a filing period, the Bureau's opposition to Praise's March 3, 1994 appeal was due March 10 and was eleven days late when filed on March 21. *See* 47 CFR 1.4(d), (e), (g) (weekend days are excluded from the computation of filing periods that are less than seven days). No motion to strike was filed, however, and the Bureau's opposition is accepted.

[8] The *Comuni-Centre* court said, 856 F.2d at 1554 (footnote omitted):

> In reversing the dismissal of an applicant from a comparative proceeding, we think it clear that among the factors appropriate for consideration are the applicant's proffered justification for the failure to comply with the presiding officer's order, the prejudice suffered by other parties, the burden placed on the administrative system, and the need to punish abuse of the system and deter future misconduct.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

T-ONE COMMUNICATIONS CORP. — File No. I-T-C-94-216

Application for authority to acquire and operate facilities for service between the U.S. and various points, and to provide IBS, Television and Datanet service.

ORDER AND AUTHORIZATION

Adopted: June 1, 1994; Released: June 16, 1994

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity reuire the provision of direct service between the U.S. and Monaco, Guinea, Saudi Arabia, the United Arab Emirates, Somalia and other international locations by T-One Communications Corp. (T-One).

2. Accordingly, IT IS ORDERED that application File No. I-T-C-94-216 IS GRANTED and is authorized to:

a. lease from Comsat and operate the following satellite facilities between appropriately licensed U.S. earth stations and an appropriate INTELSAT AOR satellite, connecting with similar facilities between the satellite and the points specified below:

Country	Facilities
Monaco	One 1.544Mbps
Guinea	One 1.544Mbps
Saudi Arabia	One 1.544Mbps
United Arab Emirates	One 1.544Mbps
Somalia	Three 64Kbps

b. lease and operate facilities in the U.S. earth station;

c. lease and operate necessary domestic connecting facilities;

d. use the facilities in a, b and c above to provide international communications services, including voice and data between the U.S. and the points listed; and

e. establish channels of communications between appropriately licensed earth stations in the U.S. and INTELSAT Atlantic Ocean Region (AOR) and Pacific Ocean Region (POR) satellites for the provision of IBS, International Television and Datanet Service between the U.S. and countries listed in Comsat's Tariff F.C.C. No. 103 for the space segment of IBS and International Television and Datanet Service.

3. IT IS FURTHER ORDERED that this authorization for service between the U.S. and Somalia is subject to T-One obtaining all necessary approvals from the United Nations Operations Somalia (UNOSOM).

4. IT IS FURTHER ORDERED that the authority granted herein for T-One to establish channels of communication between the earth stations in the U.S. and the INTELSAT satellites does not dispense with the requirement that all such earth stations shall be authorized under Title III of the Communications Act of 1934, as amended, to communicate with those satellites.

5. IT IS FURTHER ORDERED that our authorization of T-One to provide private lines as part of its authorized services is limited to the provision of such private lines only between the United States and the points listed herein -- that is, private lines which originate in the United States and terminate in the points listed herein or which originate in the points listed herein and terminate in the United States. In addition, T-One may not -- and T-One's tariff must state that it's customers may not -- connect private lines provided over these facilities to the public switched network at either the U.S. and/or the points listed herein, or both, for the provision of international basic telecommunications services, including switched voice services, unless authorized to do so by the Commission upon a finding that the points listed herein afford resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates, Phase II, First Report and Order*, 7 FCC Rcd 559 (1991) *petitions for reconsideration pending.*

6. IT IS FURTHER ORDERED that neither T-One nor any persons or companies directly or indirectly controlling or controlled by T-One, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions, which is denied to any other United States carrier by reason of any concession, contract, understanding, or working arrangement to which T-One or any persons or companies controlling or controlled by T-One are parties.

7. IT IS FURTHER ORDERED that the applicant shall file copies of any operating agreement it enters into with its foreign correspondent with the Commission within 30 days of its execution, and shall otherwise comply with the filing requirements contained in Section 43.51 of the Commission's Rules, 47 C.F.R. §43.51.

8. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. §203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the service authorized in this Order.

9. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

10. IT IS FURTHER ORDERED that the applicant shall file semi-annual circuit reports pursuant to Section 63.15(b) of the Commission's Rules, 47 C.F.R. §63.15(b).

11. IT IS FURTHER ORDERED that the Commission retains jurisdiction over this matter to realloeate circuits in the satellite system among the various interntional com-

mon carriers and other authorized users as required to ensure nondiscriminatory use of, and equitable access to, the communications satellite system.

12. This authorization is not to be construed as permitting the provision of any services between earth stations located within the U.S.

13. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities
Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MCI
TELECOMMUNICATIONS
CORPORATION, *et al.*,
Complainants,

v.

GTE ALASKA INCORPORATED. File No. E-93-145

GTE CALIFORNIA INCORPORATED. File No. E-93-146

GTE FLORIDA INCORPORATED. File No. E-93-147

GTE NORTH INCORPORATED. File No. E-93-148

GTE NORTHWEST INCORPORATED. File No. E-93-149

CONTEL OF MAINE, INC. File No. E-93-154
d/b/a GTE MAINE
CONTEL OF NEW HAMPSHIRE, INC.
d/b/a GTE NEW HAMPSHIRE
CONTEL OF VERMONT, INC.
d/b/a GTE VERMONT
CONTEL OF WEST VIRGINIA, INC.
d/b/a GTE WEST VIRGINIA

CONTEL OF THE SOUTH, INC. File No. E-93-155
d/b/a GTE SYSTEM OF THE SOUTH
CONTEL OF KENTUCKY, INC.
d/b/a GTE KENTUCKY
CONTEL OF NORTH CAROLINA, INC.
d/b/a GTE NORTH CAROLINA
CONTEL OF SOUTH CAROLINA, INC.
d/b/a GTE SOUTH CAROLINA
CONTEL OF VIRGINIA, INC.
d/b/a GTE VIRGINIA

CONTEL OF ARKANSAS, INC. File No. E-93-156
d/b/a GTE ARKANSAS
CONTEL OF ILLINOIS, INC.
d/b/a GTE ILLINOIS
CONTEL OF INDIANA, INC.
d/b/a GTE INDIANA
CONTEL OF IOWA, INC.
d/b/a GTE IOWA
CONTEL OF KANSAS, INC.
d/b/a GTE SYSTEM OF IOWA
(FOR THE STATE OF IOWA), and
d/b/a GTE SYSTEM OF ARKANSAS
(FOR THE STATE OF ARKANSAS).
CONTEL OF MINNESOTA, INC.
d/b/a GTE MINNESOTA
CONTEL OF MISSOURI, INC.
d/b/a GTE MISSOURI
CONTEL OF NORTH DAKOTA, INC.
d/b/a GTE NORTH DAKOTA
CONTEL OF SOUTH DAKOTA, INC.
d/b/a GTE SOUTH DAKOTA

CONTEL OF THE NORTHWEST, INC. File No. E-93-157
d/b/a GTE SYSTEM OF THE NORTHWEST

CONTEL OF THE WEST, INC. File No. E-93-158
d/b/a GTE WEST

J.B.N. TELEPHONE COMPANY, INC. File No. E-93-159
d/b/a GTE TELEPHONE COMPANY

CONTEL TEXAS, INC. File No. E-93-160
d/b/a GTE TEXAS

ALSO KNOWN AS
GTE SYSTEM TELEPHONE COMPANIES, and

CONTEL OF CALIFORNIA, File No. E-93-161
Defendants.

ERRATUM

Released: June 17, 1994

By the Chief, Formal Complaints and Investigations Branch, Enforcement Division, Common Carrier Bureau:

Paragraph one of the Order in the above-captioned complaints, DA 94-552, released June 6, 1994, is corrected by deleting "Wiltel, Inc. (Wiltel)" and inserting in place thereof "MCI Telecommunications Corporation (MCI").

FEDERAL COMMUNICATIONS COMMISSION

Thomas D. Wyatt
Chief, Formal Complaints and
Investigations Branch
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
June 13, 1994

Released: June 14, 1994

TV Food Network
c/o John I. Davis, Esq.
Wiley, Rein & Fielding
1777 K Street, N.W.
Washington, DC 20006

Dear Mr. Davis:

This is in response to your letter of May 13, 1994, seeking confirmation that the addition of the TV Food Network ("TVFN") to cable systems prior to July 14, 1994 will not constitute a restructuring triggering refund liability pursuant to Section 76.922(b)(6)(B) of the Commission's rules, consistent with the Commission's rulings relating to the fX channel.[1]

First, you note that a number of cable operators with pre-existing plans to introduce TVFN prior to July 14, 1994 have expressed concern that adding TVFN to their systems may trigger refund liability under Section 76.922(b)(6)(B) of the Commission's rules. The prohibition on a service restructuring as a condition of the deferral of refund liability until July 14, 1994 is intended to provide operators an additional period of time to comply with new rate regulation while protecting consumers against rate and service restructuring that would not otherwise be subject to refund liability. As we have stated in other letters, we do not believe that the pre-planned addition or substitution of a program service to a regulated tier during the deferral period without a rate increase raises a serious risk of harm to consumers.[2] Such a channel addition or substitution during the deferral period thus will not trigger refund liability under Section 76.922(b)(6)(B) of the Commission's rules. We believe that the situation described in your letter, particularly the pre-planned nature of the arrangements to add TVFN, completed prior to release of our revised regulations, is similar to that considered in the letters concerning the launch of the fX channel. Therefore, consistent with prior rulings and subject to the same limitations, operators' addition of TVFN under the circumstances described in your letter will not be considered a restructuring that would trigger refund liability.

Second, you inquire whether operators who are unable through reasonable efforts to provide the required written notice to subscribers of the addition of TVFN in regularly scheduled mailings may do so through on-screen and newspaper announcements. Pursuant to Sections 76.964 and 76.309(c)(3) of the Commission's rules, cable operators are required to provide subscribers with thirty (30) days written notice of the addition of a new program service. However, we determined in a previous letter concerning the launch of the fX channel that, under the circumstances described there, a waiver of our notice provisions was appropriate because of the transitional issues raised. We thus waived the requirements of Sections 76.964 and 76.309(c)(3) of the Commission's rules to permit operators with pre-existing plans to launch fX prior to July 14, 1994 to provide 30 days notice of the launch through on-screen and newspaper announcements.[3] Again, we believe that the situation described in your letter is similar to that considered in the letters concerning the launch of the fX channel. Thus, we will waive our notice requirements as applied to the introduction of TVFN. This waiver is subject to the same limitations and conditions as are contained in the referenced prior rulings.

Sincerely,

Meredith J. Jones
Chief, Cable Services Bureau

---

[1] *See In re fX Channel* (released April 20, 1994, Cable Services Bureau) and *In re fX Channel* (released April 22, 1994, Cable Services Bureau)(clarifying impact of 47 C.F.R. § 76.922 on the June 1, 1994 launch of fX).

[2] *See In re fX Channel*, (released April 20, 1994, Cable Services Bureau); *In re fX Channel*, (released April 22, 1994, Cable Services Bureau); *In re Prime Sports Network -- Midwest*, (released May 16, 1994)(clarifying impact of 47 C.F.R. § 76.922 on the launch of PSN-MW).

[3] *In re fX Channel* (released May 9, 1994)(providing limited waiver of notice provisions in 47 C.F.R. §§ 76.964 and 76.309(c)(3) as applied to fX).

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 94-11

In re Application of

TELEPHONE AND DATA SYSTEMS, INC. — File No. 10209-CL-P-715-B-88

For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block B, in Market 715, Wisconsin 8 (Vernon), Rural Service Area

MEMORANDUM OPINION AND ORDER

Adopted: June 9, 1994; Released: June 21, 1994

By the Review Board: MARINO (Chairman) and GREENE.

1. Townes Telecommunications, Inc. (TTI), pursuant to 47 CFR 1.301(a)(1), appeals a ruling from Administrative Law Judge Joseph P. Gonzalez (ALJ) denying its request for leave to intervene as a matter of discretion pursuant to 47 CFR 1.223(b). *See Order*, FCC 94M-270, released April 18, 1994. Relying on the same arguments of economic interest and ability to provide background information made before the ALJ, TTI now argues that it established "party in interest" status below entitling it to intervene as a matter of right pursuant to Section 1.223(a). *See* Appeal at 1, 3. We affirm the ALJ's denial of intervention because TTI has not shown an *adverse* tangible economic interest in the outcome of this case. *See Algreg Cellular Engineering*, 6 FCC Rcd 5299, ¶ ¶ 5-8 (Rev. Bd. 1991).

2. *Background:* The application of Telephone and Data Systems, Inc. (TDS) for cellular facilities in the Vernon, Wisconsin market was designated for hearing "on character issues concerning a TDS subsidiary's conduct before the Commission [United States Cellular Corporation (USCC)], and whether this calls into question TDS's qualifications to be a Commission licensee." *TDS*, 9 FCC Rcd 938 ¶ 1 (1994). The issues, which grew out of *La Star Cellular Telephone Co.*, 7 FCC Rcd 3762, at n.3 (1992) read:

> (1) To determine whether United States Cellular Corporation misrepresented facts to the Commission, lacked candor in its dealings with the Commission, or attempted to mislead the Commission, and, in this regard, whether United States Cellular Corporation has violated Section 1.17 of the Commission's Rules, 47 C.F.R. § 1.17.
>
> (2) To determine, based on the evidence adduced in issue 1, above, whether Telephone and Data Systems, Inc. possesses the requisite character qualifications to hold the cellular Block B authorization for the Wisconsin 8 (Vernon) Rural Service Area and, accordingly, whether grant of its application would serve the public interest, convenience, and necessity.

3. Within 30 days of the release of the designation order, TTI filed a timely petition for leave to intervene, which the ALJ denied because TTI had failed to show "a tangible economic interest in the outcome of the instant proceeding, or that its participation will assist the Commission in the resolution of the issues at hand." *Order, supra*, at 2. Section 309(e) of the Communications Act provides that:

> When the Commission ... designates an application for hearing, the parties-in-interest, if any, who are not notified by the Commission of such action may acquire the status of a party to the proceeding thereon by filing a petition for intervention showing the basis for their interest not more than thirty days after publication of the hearing issues or any substantial amendment thereto in the Federal Register.

Section 1.223(a) of the Commission's Rules which implements this statutory provision provides that:

> (a) Where, in cases involving applications for construction permits and station licenses... the Commission has failed to notify and name as a party to the hearing any person who qualifies as a party in interest, such person may acquire the status of party by filing, under oath and not more than 30 days after the publication in the FEDERAL REGISTER of the hearing issues or any substantial amendment thereto, a petition for intervention showing the basis of its interest. . . . Where the person's status as a party in interest is established, the petition to intervene will be granted.

4. In its Appeal at 3, TTI now argues that its interest in this case is "concrete and intervention is required pursuant to § 1.223(a) of the rules." To support this general plea for relief, TTI quotes from its intervention motion that "in various cellular markets in which TTI, has or will have ownership interest, TDS and its affiliated companies are in a position to acquire controlling interest." *Id.*, at 1. It argues "a decision in the instant case could have a significant impact upon TTI, in those markets in which TDS is positioned to acquire a controlling interest." *Id.*, at 2. TTI alludes to only one specific example which "clarifies" its economic interest and right to intervene in this case: the Commission's August 20, 1993 consent to assign cellular facilities in the Hardeman, Texas market. TTI asserts that one of its subsidiaries "is a one-third owner of the assignor and will possess an ownership interest upon consummation" of that transaction. *Id.*, at 3. Apparently, because TDS or a subsidiary is a party to that transaction, the Commission has conditioned a grant upon "any subsequent action the Commission may take concerning the [*La Star*] issues" designated against TDS and its subsidiary in the instant case, ¶ 2 above. It appears the Texas transaction has not been consummated because of the condition. *See* Appeal at 2-3, nn.2-3.

5. TDS and its subsidiary USCC oppose TTI's appeal. They note that the issues designated for hearing in this case are confined to the Vernon, Wisconsin market, *supra* ¶ 2, where TTI has no ownership interest; and that after resolu-

tion of the Wisconsin case, if the Commission decides to revisit the Texas proceeding, in which TTI does have a minority ownership interest. "TTI will have a full opportunity to seek to participate in any such proceeding in which it holds an interest." Opposition, at 3. Moreover, TDS states that it and TTI "have identical interests in the outcome" of the instant case, and it is well-settled that persons with common economic or ownership interest do not have a right to intervene in FCC proceedings absent a showing that their interests will not be represented by the majority owners. *Id.*, at 4-5.

6. *Discussion:* A person seeking to intervene as a party in interest in an FCC proceeding must show that it will be aggrieved or adversely affected by a Commission decision in that case. *Algreg, supra.* Shortly after the adoption of the Communications Act, the Supreme Court, in *FCC v. Sanders Brothers Radio Station*, 309 U.S. 470, 476-77 (1940), held that "one likely to be financially injured by the issue of a license" was a party-in-interest with standing to appeal an FCC licensing proceeding. The Court of Appeals for the District of Columbia Circuit later indicated in *Johnston Broadcasting Co. v. FCC*, 175 F.2d 351, 358 (D.C. Cir. 1949), "[i]t is only common sense to assume that *adversaries* with substantial interests at stake will overlook no advantage to be found in an opponent's weaknesses." (Emphasis added). Following these Court decisions, Congress in 1952 specifically provided in Public Law No. 320, 66 Stat. 715, amending § 309, that parties-in-interest have an absolute right to intervene in licensing proceedings without showing that they could assist in the resolution of the issues. *See American Communications Ass'n v. United States*, 298 F.2d 648, 651 n.5 (2d Cir. 1962); *see also Elm City Broadcasting Corp. v. U.S.*, 235 F.2d 811, 816 (D.C. Cir. 1956) (Commission may not deny intervention to a party in interest merely because it thinks intervenor's participation would not aid in its decisional process).

7. TTI has failed to show how the ALJ erred in ruling that it had not shown a tangible economic interest in the outcome of the instant proceeding. To establish that it is a party in interest in the Vernon, Wisconsin market, TTI is arguing only that its minority ownership interest in a grant in Texas is conditioned on the outcome here, and consequently, that consummation there has been delayed. TDS is correct that TTI has an identical or common interest with TDS in the outcome of the present Wisconsin hearing: a speedy and favorable resolution of the issues in this case that will remove the condition delaying consummation of the assignment. TDS is also correct that intervention will not be granted in Commission cases where different principals share identical or common interests. *See, AT&T*, 7 RR 2d 515 (1966) (corporate stockholders who sought to intervene failed to show independent interest from that represented by the corporation itself); *see also The Seven Hills Television Co.*, 2 FCC Rcd 6867, 6889 ¶ 72 (Rev. Bd. 1987) (subsequent history omitted). And TTI has not shown that it has any pending mutually exclusive applications with TDS that may justify intervention. *See RKO General*, 94 FCC Rcd 890, 893 ¶ 4 (1983). Furthermore, before any adverse action can be taken in the Texas case on the basis of any adverse facts that may be developed here, further proceedings must be instituted by the Commission, at which time TTI will have an opportunity to intervene.

8. Finally, our own review of the record establishes that TTI has not shown that its participation will assist the Commission in resolving the designated issues. Although this point is not raised in TTI's appeal, we note that before the ALJ, TTI referred to a civil action pending in Texas in which it is a party, along with TDS and affiliated companies, stating that TTI was, therefore, able to provide useful information about the way TDS and its affiliates conduct their business as required by § 1.223(b). Section 1.223(b) provides:

> (b) Any other person desiring to participate as a party in any hearing may file a petition for leave to intervene .... The petition must set forth the interest of petitioner in the proceedings, *must show how such petitioner's participation will assist the Commission in the determination of the issues in question*, must set forth any proposed issues in addition to those already designated for hearing, and must be accompanied by the affidavit of a person with knowledge as to the facts set forth in the petition. The presiding officer, in his discretion, may grant or deny such petition or may permit intervention by such persons limited to a particular stage of the proceeding.

(Emphasis added). Here, the specific issues which the Commission designated for hearing concern the candor of USCC in the *La Star* case and any possible impact upon TDS' character qualifications. TTI failed to show any special knowledge regarding the designated *La Star* issues. Thus, the ALJ did not abuse his discretion when he held that TTI had failed to show that "its participation will assist the Commission in the resolution of the issues at hand." *Order, supra*, p. 2. *See Listeners' Guild Inc. v. FCC*, 813 F.2d 465, 470 (D.C. Cir. 1987) ("broad, undifferentiated desire to participate does not satisfy the strictures of the intervention rule").

9. ACCORDINGLY, IT IS ORDERED, That the Appeal of Order Denying Intervention, filed April 25, 1994, by Townes Telecommunications, Inc., IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Joseph A. Marino
Chairman, Review Board

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

American Telephone and Telegraph Company — File No. I-T-C-94-222

Application for Authorization pursuant to the HAW-4/TPC-3 Section 214 Authorization to Convey Interests in Capacity in the HAW-4/TPC-3 Cable System

ORDER AND CERTIFICATE

Adopted: June 1, 1994; Released: June 20, 1994

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application filed by American Telephone and Telegraph (AT&T), pursuant to Section 214 of the Communications Act of 1934 (the Act), as amended, we find that the present and future public convenience and necessity require grant of this application to transfer, on an Indefeasible Right of User (IRU) basis, interests in capacity in the HAW-4/TPC-3 Cable System,[1] as described *infra* in ¶ 2.

2. Accordingly, IT IS HEREBY ORDERED that application File No. I-T-C-94-222 IS GRANTED and AT&T is authorized to transfer, on an IRU basis, the following amount of half-interests in MAUOs[2] in the HAW-4/TPC-3 Cable System to the following international carriers:

Half-interests in MAUOs	Segments/ Subsegments	Carriers
30	(B)[3]	JTB[4]
30	(D1, D3)[5]	JTB
30	(D1, D2)[6]	MCII[7]
30	(B)	MCII
30	(D1, D2)	OPTUS[8]
30	(D1, D3)	OPTUS
330	(D1, D3)	TELSTRA[9]
15	(D1, D3)	PHILCOM[10]
15	(D1, D3)	PLDT[11]

3. This order is issued pursuant to Section 0.291 of the Commission's Rules and is effection upon release. Petitions for reconsideration under Section 1.106 or applications for review Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*See* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

[1] The HAW-4/TPC-3 Cable System extends between landing points at cable stations at Point Arena, California; Makaha, Island of Oahu, Hawaii; Chikura, Japan; Tanguisson, Island of Guam. AT&T was authorized to own and operate capacity in HAW-4/TPC-3 pursuant to *AT&T Authorization*, 4 FCC Rcd 7161 (1989).

[2] A MAUO is a Minimum Assignable Unit of Ownership, which is a 64-kilobit per second circuit equivalent.

[3] Segment B extends between Point Arena, California and Makaha, Hawaii.

[4] JTB is Jabatan Telekom Brunei of Brunei Darussalam.

[5] These subsegments extend between Makaha, Hawaii and Tanguisson, Guam.

[6] These subsegments extend between Makaha, Hawaii and Chikura, Japan.

[7] MCII is MCI International.

[8] OPTUS is an Australian carrier.

[9] TELSTRA is also an Australian carrier.

[10] PHILCOM is Philippine Global Communications, Inc. of the Philippines.

[11] PLDT is the Philippine Long Distance Telephone Company of the Philippines.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

American Telephone and Telegraph Company — File No. I-T-C-94-223

Application for Authorization, pursuant to the G-P-T Section 214 Authorization to Convey Interests in Capacity in the G-P-T Cable System

ORDER AND CERTIFICATE

Adopted: June 1, 1994; Released: June 20, 1994

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application filed by American Telephone and Telegraph (AT&T), pursuant to Section 214 of the Communications Act of 1934 (the Act), as amended, we find that the present and future public convenience and necessity require grant of this application to transfer, on an Indefeasible Right of User (IRU) basis, interests in capacity in the G-P-T Cable System,[1] as described *infra* in ¶ 2.

2. Accordingly, IT IS HEREBY ORDERED that application File No. I-T-C-94-222 IS GRANTED and AT&T is authorized to transfer, on an IRU basis, the following amount of half-interests in MAUOs[2] in the G-P-T Cable System to the following international carriers:

Half-interests in MAUOs	Segments/ Subsegments	Carriers
11	(B1, B2)[3]	BT[4]
15	(B2, B3)[5]	Belgacom
15	(B2, B3)	PTT Telecom (Netherlands)
30	(B2, B3)	MCII[6]
30	(B2, B3)	OPTUS[7]
30	(B2, B3)	MCI
60	(B1, B3)[8]	DBP-T[9]

3. This order is issued pursuant to Section 0.291 of the Commission's Rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*See* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

[1] The G-P-T Cable System extends between landing points at cable stations at Tanguisson, Island of Guam; Infanta, Island of Luzon, the Philippines; and Fangshan, Taiwan. AT&T was authorized to own and operate capacity in G-P-T pursuant to *AT&T Authorization*, 3 FCC Rcd 5091 (1988).

[2] A MAUO is a Minimum Assignable Unit of Ownership, which is a 64-kilobit per second equivalent circuit.

[3] These subsegments extend between Infanta, Philippines and Tanguisson, Guam.

[4] BT is British Telecommunications, plc of the United Kingdom.

[5] These subsegments extend between Tanguisson, Guam and Fangshan, Taiwan.

[6] MCII is MCI International, Inc.

[7] OPTUS is an Australian carrier.

[8] These subsegments extend between Infanta, Philippines and Fangshan, Taiwan.

[9] DBP-T is Deutsche Bundespost TELEKOM of Germany.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

ANSWER IOWA, INC.	File No. I-T-D-94-003
Application for authority to close public coast station WHF926, Sioux City, Iowa.	
Application for authority to close public coast station WHH391, Clinton, Iowa.	File No. I-T-D-94-004
Application for authority to close public coast station WQZ339, Des Moines, Iowa.	File No. I-T-D-94-005
Application for authority to close public coast station KLU775, Pascagoula, Mississippi.	File No. I-T-D-94-006

ORDER AND AUTHORIZATION

Adopted: June 1, 1994; Released: June 20, 1994

By the Chief, International Facilities Division:

1. The above-captioned applications, filed on March 11, 1994 by Answer Iowa, Inc., request authority, pursuant to Section 214 of the Communications Act of 1934, as amended, to discontinue service from public coast stations WHF926, Sioux City, Iowa, WHH391, Clinton, Iowa, WQZ339, Des Moines, Iowa, and KLU775, Pascagoula, Mississippi. No comments were filed in response to the applications.

2. Station WHF926 provides service to commercial and recreational vehicles in the Missouri River area near Sioux City, Iowa. Station WHH391 serves commercial and recreational vehicles in the Missouri River area near Clinton, Iowa. Station WQZ339 is available to commercial and recreational traffic in the Saylorville Lake area near Des Moines, Iowa. Station KLU775 provides service to commercial and recreational vessels in the Gulf of Mexico near Pascagoula, Mississippi. The applications were placed on public notice on March 23, 1994.

3. The basic statutory test to be applied by this Commission in considering applications for discontinuance of Common Carrier services to a community is found in Section 214(a) of the Act. Under this Section, the Commission will permit discontinuance of service upon a finding that "neither the present nor future public convenience and necessity will be adversely affected" by the proposed action. Application of this standard presents the Commission with a task of balancing the financial burden that would be imposed on the carrier by continued operation of its facilities against the needs and interests of the user community.[1]

4. In support of its applications, Answer Iowa states that all four stations have carried minimal traffic in the recent past. The decline in traffic is due to the emergence of new technologies such as cellular telephone service and satellite communications. Answer states that emergency communications are handled by the U.S. Coast Guard.

5. Upon consideration of the application and in view of the foregoing, IT IS HEREBY CERTIFIED that neither the present nor the future public convenience and necessity will be adversely affected by the discontinuance of service via public stations WHF926, WHH391, WQZ339 and KLU775.

6. Accordingly, IT IS ORDERED that applications File Nos. I-T-D-94-003, I-T-D-94-004, I-T-D-94-005 and I-T-D-94-006 ARE GRANTED, and Answer Iowa is authorized to discontinue service via public coast stations WHF926, WHH391, WQZ339 and KLU775.

7. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.114 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

[1] *Public Coast Radiotelegraph Stations*, 67 FCC 2d 790 at 795 (1978).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN TELEPHONE AND TELEGRAPH COMPANY — File No. USP-94-W-047

Petition for Waiver of the International Settlements Policy to Introduce and Establish an Accounting Rate with Unitel Communications, Inc., in Canada

ORDER AND AUTHORIZATION

Adopted: June 8, 1994; Released: June 20, 1994

By the Chief, International Facilities Division:

INTRODUCTION

1. American Telephone and Telegraph Company (AT&T) has filed the above-captioned request for waiver of the Commission's International Settlements Policy (ISP) to introduce and establish an accounting rate with Unitel Communications, Inc., in Canada. On December 14, 1993, Graphnet, Inc. filed an objection to AT&T's request.[1] Pursuant to Section 64.1001 of the Commission's Rules, 47 C.F.R. §64.1001, the Bureau sent a letter informing AT&T that grant of its waiver may not serve the public interest, and that it must await formal staff action by the Common Carrier Bureau before the proposed modification can be implemented.[2] For the reasons stated herein, we grant AT&T's waiver request.

PLEADINGS

2. In its waiver request, AT&T proposes to introduce an accounting rate for International Message Telephone Service (IMTS) of $.28 per conversation minute for full time periods and $.24 per conversation minute for reduced time periods. AT&T also proposes that the accounting rate be implemented retroactively, effective on September 1, 1993. According to AT&T, the retroactive effective date is coincident with the introduction of service, and is not in any way designed to enrich the foreign correspondent.

3. Graphnet asks the Commission to deny AT&T's waiver request. According to Graphnet, AT&T has been diverting Graphnet's basic real time switched terminating telex traffic through Canada via Unitel's facilities. Graphnet alleges that this action violates: (a) Sections 202(a), 203(a), 203(c) and 214(a) of the Communications Act; (b) the International Settlements Policy; and (c) the FCC's No Third Country routing via Canada Policy. In addition, Graphnet states that the action is especially egregious because Unitel is an affiliate of AT&T. Consequently, Graphnet argues, the Commission should not grant AT&T's request by formal staff action.

4. AT&T moves to dismiss Graphnet's opposition on the grounds that (a) the objections are unrelated to the proposed accounting rate agreement; (b) Graphnet has shown no reason to delay the implementation of the proposed accounting rate; and (c) Graphnet's substantive claims lack merit. AT&T asserts that Graphnet should be required to pursue any remedy through the Commission's complaint process.[3]

DISCUSSION

5. Although Graphnet objected to AT&T's petition, its comments related to matters outside AT&T's waiver request. Because we agree with AT&T that this waiver request is not the proper forum in which to address Graphnet's claims, we dismiss Graphnet's objection. As a result, we address neither Graphnet's substantive allegations, nor AT&T's substantive response to those allegations.

6. Although AT&T has requested a waiver of the ISP, it actually seeks only to introduce IMTS in correspondence with Unitel at the same accounting rate applicable to the IMTS that MCI Telecommunications Corporation offers in correspondence with Stentor. The only reason AT&T needs a waiver here is that it seeks to apply the rate retroactively to the date on which it began service.[4] Furthermore, no party has argued that any other terms or conditions relating to the exchange or routing of IMTS traffic in AT&T's agreement with Unitel are any different than those in the agreement between MCI and Stentor.[5] In addition, AT&T in this case explains that the retroactive introduction of the rate is coincident with the introduction of the service and is not in any way designed to enrich the foreign correspondent.

7. Graphnet does not dispute either AT&T's argument that the retroactive effective date is coincident with the introduction of service or A&T's assertion that the retroactive effective date is not meant to enrich Unitel. Nor does Graphnet argue that AT&T did not make a sufficient pub-

---

[1] *See* Letter dated December 14, 1993 from Robert E. Conn, Attorney, Graphnet, to George S. Li, Chief, International Facilities Division, Common Carrier Bureau, FCC.

[2] *See* Letter dated December 14, 1993 from George S. Li, Chief, International Facilities Division, Common Carrier Bureau, FCC, to Elaine R. McHale, Senior Attorney, AT&T.

[3] Indeed, on February 1, 1994, Graphnet filed a formal complaint against AT&T asserting essentially the same charges it alleges in this proceeding.

[4] 47 C.F.R. §43.51(d)(1) (1992).

[5] The accounting rate between MCI and Stentor was $.28 (full) and $.24 (reduced) at the time of AT&T's waiver request. *See* MCI Petition for Waiver of the ISP for change in the accounting rate with Canada (Stentor), USP-94-W-127. In addition, neither Graphnet nor any other entity has alleged that any other terms or conditions in MCI's agreement with Stentor relating to the exchange of IMTS traffic or the interchange or routing of IMTS traffic, including the allocation of proportionate return, are any different than AT&T's.

lic interest showing to justify its retroactive effective date. Rather, Graphnet argues against the introduction of the proposed IMTS accounting rate because AT&T has allegedly routed *telex* traffic through Unitel's facilities.

8. We note that the Commission has consistently sought to ensure that its waiver and notifications procedure is not used to obstruct legitimate changes to accounting rates.[6] In this case, Graphnet has failed to rebut AT&T's argument that grant of AT&T's waiver request is in the public interest. Nor has Graphnet made any other attempt to show that grant of AT&T's waiver request would be inconsistent with the public interest. In addition, we have found no evidence of whipsawing or any other violations of Commission policy in AT&T's agreement with Unitel for the exchange of IMTS service. Under these circumstances, we believe that consideration of Graphnet's objection in this forum is unwarranted. Graphnet is free to address these issues in a more appropriate forum,[7] and has, in fact, pursued its complaint under Section 203 of the Act.

9. Accordingly, IT IS ORDERED that AT&T's petition for waiver of the ISP, File No. USP-94-W-047, to implement its accounting rate for IMTS with Unitel effective September 1, 1993, IS GRANTED.

10. IT IS FURTHER ORDERED that Graphnet's formal objection, filed December 14, 1993, to AT&T's waiver petition IS DENIED.

11. This order is issued under Section 0.291 of the Commission's Rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

[6] *See, e.g., Implementation and Scope of the Uniform Settlements Policy for Parallel International Communications Routes*, CC Docket No. 85-204, 51 Fed. Reg. 4736 ¶50 (February 7, 1986), *Order on Reconsideration*, 2 FCC Rcd 1118 (1987), *Further Reconsideration*, 3 FCC Rcd 1614 (1988).

[7] For instance, we note that U.S. carriers such as AT&T must comply with the ISP with regard to telex traffic agreements, in addition to agreements for the exchange of IMTS traffic.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

COMSAT CORPORATION File No. CSS-90-006-LA

Application for authority
to participate in the launch
of the INTELSAT VII (F-3)

ORDER AND AUTHORIZATION

Adopted: June 1, 1994; Released: June 20, 1994

By the Chief, International Facilities Division:

1. The Commission has under consideration application, File Number CSS-90-006-LA, filed by the Communications Satellite Corporation (Comsat) (now COMSAT Corporation) on May 18, 1990, and supplemented on September 6, 1990 and January 14, 1994, for authority to participate in the launch, positioning and in-orbit testing of the INTELSAT VII (F-3) satellite, hereafter referred to as the 703 satellite.

2. The application appeared on the Commission's Public Notice on June 20, 1990. Comments were received by Pan American Satellite (PAS) on July 20, 1990. PAS states in its comments that it does not object to Comsat's current requests for launch authority, but asks that any action that the Commission takes be without prejudice to two pending matters that relate to the INTELSAT VII procurement. The first is PAS's appeal of the Commission's February 1990 INTELSAT VII procurement decision.[1] The second is PAS's complaint filed in January 1989 in which it contends that Comsat's participation in the INTELSAT VII procurement prior to receiving FCC approval constituted a violation of statutes and FCC policies.[2] PAS therefore asks that the Commission take no action with respect to the instant applications that would prejudice or adversely affect the outcome of PAS's pending appeal and complaint.

3. In the application, Comsat states that the 703 satellite is currently under construction at Ford Aerospace Company (FAC) and is expected to be delivered approximately September 1, 1992. Current INTELSAT deployment plans approved by the INTELSAT Board of Governors at the BG-99 December 1993 meeting call for the launch to take place in July 1994, utilizing an Atlas IIA launch vehicle. This satellite will replace the INTELSAT V-A (F-11) at 177^0 East Longitude in the Pacific Ocean Region (POR).

4. The estimated costs associated with the 703 satellite are as follows (all amounts in real year dollars):

FAC Contract (including delivery price, engineering changes and amendments)	$ 79.1 million
FAC Launch Support (to be determined)	
Performance Incentives, Capitalized	$ 2.7 million
Performance Incentives, Expensed	$ 23.9 million
Support Contract	$ 3.2 million
Launch Services	$ 99.8 million
TOTAL INTELSAT	$208.7 million
TOTAL COMSAT (based on current ownership share of 23.9 %)	$ 49.9 million

5. In view of the foregoing and the need to provide the necessary satellite facilities to meet traffic requirements, we conclude that the public interest would be served by a grant of the subject request. Accordingly, Comsat is AUTHORIZED to participate in the launch and test program of the 703 satellite to be positioned at 177^0 East Longitude, subject to the following terms and conditions:

(a) This authorization is limited to the described program. Any change in the authorized location due to a launch delay or other circumstances will be considered upon a proper request by Comsat for authority;

(b) Comsat shall furnish via the 703 satellite only those channels of communication for commercial service which have been, or may be, authorized by the Commission under Section 214 of the Communications Act of 1934, as amended;

(c) Within 30 days after completion of the testing program, Comsat shall provide the Commission with a summary report of its results and upon request, shall make the detailed test data available;

(d) Conduct of the program authorized here shall be without interruption of commercial satellite service now authorized at U.S. earth stations;

(e) Neither this authorization nor any right granted herein shall be assigned or otherwise transferred without approval of the Commission; and

(f) Unless extended or modified for good cause, this authorization shall terminate six months after the release date of this order.

(g) This action is without prejudice to any action which may be taken in the appeal of the Commission's decision as referenced in footnote 1 above.

6. This order is issued under Section 0.291 of the Commission's Rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for

[1] *See* Pan American Satellite v. FCC, No. 90-1134 (D.C. Cir., Filed March 12, 1990)
[2] *See* File No. E-89-87. This issue has been resolved. *See* 8 FCC Rd 5622, Common Carrier Bureau (1993).

review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*See* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

COMMUNICATION TELESYSTEMS INTERNATIONAL — File No. I-T-C-94-217

Application for authority to acquire and operate facilities for the provision of international services.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: June 1, 1994; Released: June 20, 1994

By the Chief, International Facilities Division:

1. Upon consideration of the captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require a grant thereof.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-94-217 IS GRANTED, and Communications TeleSystems International (CTS) is authorized to:

a. lease from Comsat and operate satellite circuits as indicated in Attachment A between appropriately licensed U.S. earth stations and appropriate INTELSAT satellites over the Atlantic and Pacific Oceans, connecting with similar circuits between the satellite and earth stations in the countries listed in Attachment A hereto furnished by CTS's correspondents in those countries;

b. lease from Comsat and operate channels of communications between appropriately licensed U.S. earth stations and appropriate INTELSAT satellites over the Atlantic and Pacific Oceans, connecting with similar channels of communications between the U.S. and those countries which are or hereafter will be listed in provisions of Comsat's Tariff FCC No. 103 pertaining to the space segment components of IBS, Datanet and International Television services;

c. lease and operate facilities in the appropriately licensed U.S. earth stations;

d. lease and operate necessary domestic connecting facilities;

e. use the facilities in a, c and d above to provide switched services between the U.S. and the points listed in Attachment A hereto;

f. use the facilities in b, c, and d, above to provide IBS, Television and Datanet services between the U.S. and those countries which are or hereafter will be listed in Comsat's Tariff FCC No. 103 pertaining to the space segment components of IBS, Television and Datanet services;

g. lease from PanAmSat and operate the satellite circuits specified in Attachment B between appropriately licensed U.S earth stations and the PAS-1 satellite connecting with similar circuits between the satellite and earth stations in the countries listed in Attachment B furnished by CTS's correspondents;

h. lease and operate facilities in the U.S. earth stations authorized to communicate with the PAS-1 satellite;

i. lease and operate necessary domestic connecting facilities;

j. use the facilities in g, h and i above to provide private line service not interconnected with public switched networks (one 64-kbps circuit to each location) and switched services interconnected with the public switched networks (six 64-kbps circuits to each location) between the U.S. and the points listed in Attachment B (Parts A and B, respectively) subject to any restrictions set forth in this or any other Commission Order involving separate international satellite systems;

k. lease from Columbia Communications Corporation (Columbia) and operate the satellite circuits specified in Attachment C between appropriately licensed U.S. earth stations and appropriate TDRSS satellites connecting with similar circuits between the satellite and earth stations in the countries listed in Attachment C furnished by CTS's correspondents;

l. lease and operate facilities in the U.S. earth stations authorized to communicate with the TDRSS satellites;

m. lease and operate necessary domestic connecting facilities;

n. use the facilities in k, l and m above to provide private line service not interconnected with public switched networks (one 64-kbps circuit to each location) and switched services interconnected with the public switched networks (six 64-kbps circuits to each location) between the U.S. and the points listed in Attachment C (Parts A and B, respectively) subject to any restrictions set forth in this or any other Commission Order involving separate international satellite systems;

o. lease and operate three 1.544-Mbps circuits between the U.S. and Mexico and between the U.S. and Canada, via U.S., Mexican or Canadian domestic satellites, for the provision of transborder services consistent with consultations under Article XIV(d) of the INTELSAT Agreement for the use of such satellites, subject to any restrictions set forth in this or any other Commission Order involving transborder services; and

p. lease and operate three 1.544-Mbps terrestrial circuits each between the U.S. and Mexico and the U.S. and Canada, for the provision of transborder services between the U.S. and Mexico and Canada, respectively, subject to any restrictions set forth in this or any other Commission Order involving transborder services.

3. IT IS FURTHER ORDERED that our authorization of applicant to provide private lines is limited to the provision of such private lines only between the U.S. and those

points listed in Comsat's Tariff F.C.C. No. 103 or any of the points listed in the Attachments B and C hereto -- that is, private lines which originate in the U.S. and terminate in one of the points listed in Comsat's Tariff F.C.C. No. 103 or any of the points listed in the Attachments B and C hereto or which originate in one of the points listed in Comsat's Tariff F.C.C. No. 103 or any of the points listed in the Attachments B and C hereto and terminate in the U.S. In addition, the applicant may not -- and the applicant's tariff must state that its customers may not -- connect private lines provided over these facilities to the public switched network at either the U.S. or foreign end, or both, for the provision of international basic communications services, including switched voice services, unless authorized to do so by the Commission upon a finding that the foreign administration affords resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates*, Phase II, First Report and Order, 7 FCC Rcd 559 (1991), *Order on reconsideration and Third Further Notice of Proposed Rulemaking*, 7 FCC Rcd 7927 (1992), *petition for reconsideration pending*.

4. IT IS FURTHER ORDERED that the number of circuits authorized herein for the provision of services via separate satellite systems is subject to limitations on the number of circuits specified under the separate systems policy and applicable consultations under Article XIV(d) of the INTELSAT Agreement.

5. IT IS FURTHER ORDERED that the Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to ensure nondiscriminatory use of, and equitable access to, the communications satellite system.

6. IT IS FURTHER ORDERED that no material changes inconsistent with this or any other relevant Commission Order shall be made before final execution of operating agreements between CTS and its correspondents in any of the points listed in the Attachments A, B and C hereto, and copies of the agreements, including the applicable accounting rate, shall be filed with the Commission within 30 days of their execution and CTS shall otherwise comply with the filing requirement contained in §43.51 of the Commission's Rules, 47 C.F.R. §43.51.

7. IT IS FURTHER ORDERED that neither CTS nor any persons or companies directly or indirectly controlling or controlled by CTS, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions, which is denied to any other United States carrier by reason of any concession, contract, understanding, or working arrangement to which CTS or any persons or companies controlling or controlled by CTS are parties.

8. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the service authorized in this Order.

9. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. § 43.61.

10. IT IS FURTHER ORDERED that the applicant shall file a semi-annual circuit reports pursuant to § 63.15(b) of the Commission's Rules, 47 C.F.R. § 63.15(b) for circuits provided over the INTELSAT system.

11. IT IS FURTHER ORDERED that the applicant shall file a separate Section 214 application for the use of any additional circuits over separate international satellite systems.

12. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

ATTACHMENT A

CTS REQUESTED SERVICE POINTS FOR INTELSAT SATELLITE CIRCUITS

(A) Atlantic Ocean Area Regions

Latin America

Antigua	Curacao	Netherlands Ant.
* Argentina	**Dominican Republic	Nicaragua
Aruba	Ecuador	**Panama
Bahamas	**El Salvador	Paraguay
Barbados	French Guiana	Peru
Belize	Grenada	St. Lucia
Bermuda	Guantanamo Bay	St. Vincent
Bolivia	Guatemala	Surinam
* Brazil	Guyana	Trinidad & Tobago
Cayman Islands	Haiti	Turks & Caicos Isles
* Chile	Honduras	Uruguay
**Colombia	Jamaica	* Venezuela
Costa Rica	Martinique	

Europe

**Austria	**Ireland	San Marino
* Belgium	* Italy	Slovenia
Croatia	Liechtenstein	* Spain
Cyprus	Luxembourg	* Sweden
**Denmark	Malta	* Switzerland
**Finland	Monaco	Turkey
* France	* Netherlands	* United Kingdom
* Germany	**Norway	Vatican
**Greece	Portugal	Yugoslavia
Iceland		

Middle/Near East and Africa and Other Europe

Algeria	**Belarus	Canary Islands
Angola	Benin	Cape Verde
Armenia	Botswana	Central African Rep.
Ascension Isl.	Bulgaria	Chad
Azerbiajan	Burkina Faso	Congo
Azores	Burma	**Czechoslovakia
**Bahrain	Cameroon	Diego Garcia

Notes: One 1.544-Mbps circuit requested to each country marked by single *. Six 64-Kbps circuits requested to each country marked by double **. One 64-kbps circuit requested to each of the other countries.

ATTACHMENT A
(Continued)

CTS REQUESTED SERVICE POINTS FOR INTELSAT SATELLITE CIRCUITS

Middle/Near East and Africa and Other Europe (Cont'd)

**Egypt
Estonia
Ethiopia
Gabon
Gambia
Georgia
Ghana
Gibraltar
Guinea
**Hungary
Iran
Iraq
* Israel
Ivory Coast
Jordan
Kazakhstan
Kenya
**Kuwait
Kyrgyzstan
Latvia
**Lebanon
Lesotho
Liberia
Libya
Lithuania
Madagascar
Malagasy Rep.
Malawi
Mali
Mauritania
Moldova
Morocco
Mozambique
Niger
Nigeria
Oman
Pakistan
* Poland
Qatar
Romania
* Russian Federation
* Saudi Arabia
Senegal
Sierra Leone
South Africa
Sri Lanka
Sudan
Swaziland
Syria
Tajikistan
Tanzania
Togo
Tunisia
Turkmenistan
**United Arab Emirates
Yemen
Zaire
Zambia
Zimbabwe
Uganda
**Ukraine
Uzbekistan

(B) Pacific Ocean Area Region

American Samoa
* Australia
Brunei
* China (Peoples Republic Of)
Christmas Is.
Cook Island
Ebeye
Fiji Islands
French Polynesia
Guam
* Hong Kong
* India
* Indonesia
* Japan
Kiribati
* Korea
Kosrae
Majuro
* Malaysia
Mariana Is.
Nauru
New Caledonia
New Guinea
New Zealand
Palau
Papua New Guinea
**Philippines
Ponape
Saipan
* Singapore
Solomon Is.
Sri. Lanka
* Taiwan
Thailand
Tonga
Truk
Vanuatu
Western Somoa
Yap

Notes: One 1.544-Mbps circuit requested to each country marked by single *. Six 64-Kbps circuits requested to each country marked by double **. One 64-kbps circuit requested to each of the other countries.

ATTACHMENT B

CTS REQUESTED SERVICE POINTS FOR PAS-1 SATELLITE CIRCUITS

CTS requests one 64-kbps circuit to each of the countries shown below, subject to the current maximum limitation of 64-kbps equivalent circuits per separate system.

(A) For Communications NOT INTERCONNECTED with the Public Switched Network

Ku-band Countries

Albania
Anguilla
Armenia
Austria
Azerbaijan
Bahamas
Belarus
Belgium
Bermuda
Bulgaria
British Virgin Is.
Cayman Islands
Czechoslovakia
Denmark
Estonia
France
Georgia
Germany
Greece
Hungary
Ireland
Italy
Kazakhstan
Kyrgyzstan
Latvia
Lithuania
Luxembourg
Moldova
Monaco
Montserrat
Netherlands
Poland
Portugal
Romania
Russian Federation
Spain
Sweden
Switzerland
Tajikistan
Turkmenistan
Turks & Caicos Is.
Ukraine
United Kingdom
Uzbekistan
Yugoslavia

C-band Countries

Anguilla
Antigua
Argentina
Aruba
Bahamas
Barbados
Barbuda
Belize
Bermuda
Bolivia
Brazil
British Virgin Is.
Cayman Islands
Chile
Colombia
Costa Rica
Dominica
Dominican Republic
Ecuador
Grenada
Guatemala
Guyana
Haiti
Honduras
Jamaica
Mexico
Montserrat
Netherlands Ant.
Panama
Paraguay
Peru
St. Christopher and Nevis
St. Lucia
St. Vincent and the Grenadines
Suriname
Trinidad and Tobago
Turks & Caicos Is.
Uruguay
Venezuela

ATTACHMENT B
(Continued)

CTS REQUESTED SERVICE POINTS FOR PAS-1 SATELLITE CIRCUITS

CTS requests six 64-kbps circuits to each of the countries shown below, subject to the current maximum limitation of 64-kbps equivalent circuits per separate system.

(B) For Communications INTERCONNECTED with the Public Switched Network

C-band Countries

Bahamas	Dominican Republic	Panama
Costa Rica	Netherlands Ant.	Peru

Ku-band Countries

Albania	Georgia	Portugal
Armenia	Hungary	Romania
Azerbaijan	Kazakhstan	Russian Federation
Bahamas	Kyrgyzstan	Tajikistan
Belarus	Latvia	Turkmenistan
Bulgaria	Lithuania	Ukraine
Czechoslovakia	Moldova	United Kingdom
Estonia	Poland	Uzbekistan

ATTACHMENT C

CTS REQUESTED SERVICE POINTS FOR TDRS SATELLITE CIRCUITS

CTS requests one 64-kbps circuit to each of the countries shown below, subject to the current maximum limitation of 64-kbps equivalent circuits per separate system.

(A) Countries which TDRS is authorized to provide service NOT INTERCONNECTED to the public switched network

TDRS-41

Austria
Bahamas
Belgium
Canada
Denmark
Finland
France
Germany
Ireland
Israel
Jamaica
Liechtenstein
Luxembourg
Mexico
Netherlands
Portugal
Sweden
Switzerland
Turkey
United Kingdom

TDRS-174

Hong Kong
Mexico
Philippines

CTS requests six 64-kbps circuits to each of the countries shown below, subject to the current maximum limitation of 64-kbps equivalent circuits per separate system.

(B) Countries which TDRS is authorized to provide service which IS INTERCONNECTED to the public switched network

TDRS-41	TDRS-174
United Kingdom	Hong Kong

CERTIFICATION PURSUANT TO
SECTION 63.01(4)(1)

On behalf of Communication TeleSystems International ("CTS"), I hereby certify that:

CTS does not have an "affiliation" with a "foreign carrier" as those terms are defined in Section 63.01(r)(1)(i)(ii) of the Commission's Rules.

COMMUNICATION TELESYSTEMS INTERNATIONAL

By: _____

Eric G. Lipoff
Regulatory Counsel
Communication TeleSystems International
4530 La Jolla Village Drive
Suite 100
San Diego, CA 92122

March 1, 1994

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

KEYSTONE COMMUNICATIONS CORPORATION — File No. I-T-C-94-218

Application for authority to resell the Intelsat Business Service, International Television Service and Transborder Television Service of Keystone Communications L.P.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: June 1, 1994; Released: June 20, 1994

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested, application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of Intelsat Business Services (IBS), International Television Service and transborder television service, not interconnected with the public switched network, by Keystone Communications Corporation (KCC).

2. Accordingly, IT IS ORDERED that application File No. I-T-C-94-218 IS GRANTED, and KCC is authorized to resell the IBS, International Television and transborder television services of Keystone Communications L.P. (KCLP), as set forth in its tariffs on file with the FCC, for the provision of IBS, International Television and transborder television services between the U.S. and overseas points, not interconnected with the public switched network.

3. IT IS FURTHER ORDERED that the authority granted herein for KCC to provide international private line service does not dispense with the requirement that any earth station KCC may use in the future for this service shall be authorized under Title III of the Communications Act of 1934, as amended, to communicate with those satellites.

4. IT IS FURTHER ORDERED that applicant shall file copies of any operating agreement it enters into with its foreign correspondent with the Commission within 30 days of its execution, and shall otherwise comply with the filing requirements contained in Section 43.51 of the Commission's Rules, 47 C.F.R. §43.51.

5. IT IS FURTHER ORDERED that our authorization of KCC to provide private lines is limited to the provision of such private lines only between the United States and international points -- that is, private lines which originate in the United States and terminate in points listed in tariffs or which originate in those points listed in relevant tariffs and terminate in the United States. In addition, KCC may not -- and KCC's tariff must state that KCC's customers may not -- connect private lines provided over these facilities to the public switched network at either the U.S. or foreign end, or both, for the provision of international switched services, unless authorized to do so by the Commission upon a finding that the foreign administration affords resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates*, Phase II, First Report and Order, 7 FCC Rcd 559 (1991), and *Order on Reconsideration and Third Further Notice of Proposed Rulemaking*, 7 FCC Rcd 7927 (1992), *petition for reconsideration pending*.

6. IT IS FURTHER ORDERED that neither KCC nor any persons or companies directly or indirectly controlling or controlled by KCC, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions, which is denied to any other United States carrier by reason of any concession, contract, understanding, or working arrangement to which KCC or any persons or companies controlling or controlled by KCC are parties.

7. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the service authorized in this Order.

8. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

9. IT IS FURTHER ORDERED that the applicant shall file semi-annual circuit reports pursuant to Section 63.15(b) of the Commission's Rules, 47 C.F.R. §63.15(b).

10. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commision's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

THE TITAN CORPORATION — File No. I-T-C-94-120

Application for authority pursuant to Section 214 of the Communications Act of 1934, as amended, to establish channels of communication between the United States and various international points via the Pan American Satellite system for the provision of international voice, data and video services

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: June 1, 1994; Released: June 20, 1994

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application requesting authority, pursuant to Section 214 of the Communications Act of 1934, as amended, to establish channels of communications between the U.S. and various international points via the Pan American Satellite (PAS) system for the provision of international voice, data and video services, it is hereby CERTIFIED that the public convenience and necessity will be served by its grant.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-94-120 IS GRANTED and The Titan Corporation (Titan) is authorized to:

a. lease from PAS and operate the satellite circuits specified in Attachment A (Parts A and B, respectively) between appropriately licensed earth stations in the United States and the PAS-1 satellite connecting with similar circuits between the satellite and earth stations in the countries listed in Attachment A furnished by Titan's correspondents;

b. lease and operate facilities in the U.S. earth stations authorized to communicate with the PAS-1 satellite;

c. lease and operate necessary domestic connecting facilities; and

d. use the facilities set forth in a, b and c above to provide private line services not interconnected with the public switched networks (10 64-kbps circuits to each location) and switched services interconnected with the public switched networks (six 64-kbps circuits to each location) between the U.S. and the countries listed Attachment A (Parts A and B, respectively) subject to any restrictions set forth in this or any other Commission Order involving separate international satellite systems.[1]

3. IT IS FURTHER ORDERED that our authorization of Titan to provide private lines as part of the services authorized herein is limited to the provision of such private lines only between the United States and the points listed -- that is, private lines which originate in the United States and terminate in the points listed in Attachment A or which originate in the points listed in Attachment A and terminate in the United States. In addition, Titan may not -- and its tariff must state that its customers may not -- connect private lines provided over these facilities to the public switched network at either the U.S. end or the points listed in Attachment A, or both, for the provision of international basis telecommunications services, including switched voice services, unless authorized to do so by the Commission upon a finding that the points listed in Attachment A afford resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates, Phase II, First Report and Order*, 7 FCC Rcd 559 (1991), *petitions for reconsideration pending*.

4. IT IS FURTHER ORDERED that neither Titan nor any persons or companies directly or indirectly controlling or controlled by Titan, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions, which is denied to any other United States carrier by reason of any concession, contract, understanding, or working arrangement to which Titan or any persons or companies controlling or controlled by Titan are parties.

5. IT IS FURTHER ORDERED the applicant shall file copies of any operating agreements, including the applicable accounting rate, it enters into with its foreign correspondents with the Commission within 30 days of its execution, and shall otherwise comply with the filing requirements contained in Section 43.51 of the Commission's Rules, 47 C.F.R. §43.51.

6. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. §203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

7. IT IS FURTHER ORDERED that the applicant shall file annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

[1] Although Titan requested authority for 20 64-kilobit circuits to each location for the provision of services interconnected with the public switched network, we do not believe that the request is reasonable given the number of countries requested and the limited number of circuits (1,250 64-kbps circuits) available over the PAS-1 satellite. Should Titan's service requirements exceed the number of circuits authorized herein, Titan may file a new Section 214 application.

8. IT IS FURTHER ORDERED that the applicant shall file a separate Section 214 application for the use of any additional circuits it wishes to operate via the PAS-1 satellite.

9. IT IS FURTHER ORDERED that the number of circuits authorized herein for the provision of services via separate satellite systems is subject to limitations on the number of circuits specified under the separate systems policy and applicable consultations under Article XIV(d) of the INTELSAT Agreement.

10. This order is issued pursuant to Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

ATTACHMENT A

COUNTRIES TO BE SERVED VIA PAS-1
(NOT INTERCONNECTED)

Applicant requests authority to establish up to ten (10) 64 Kbps voice grade circuits between the U.S. and the countries listed below.

(A) For Communications NOT INTERCONNECTED with the Public Switched Network

Ku-band Countries

Albania
Anguilla
Armenia
Austria
Azerbaijan
Bahamas
Belarus
Belgium
Bermuda
Bulgaria
British Virgin Is.
Cayman Islands
Czechoslovakia
Denmark
Estonia
France
Georgia
Germany
Greece
Hungary
Ireland
Italy
Kazakhstan
Kyrgyzstan
Latvia
Lithuania
Luxembourg
Moldova
Monaco
Montserrat
Netherlands
Poland
Portugal
Romania
Russian Federation
Spain
Sweden
Switzerland
Tajikistan
Turkmenistan
Turks & Caicos Is.
Ukraine
United Kingdom
Uzbekistan
Yugoslavia

C-band Countries

Anguilla
Antigua
Argentina
Aruba
Bahamas
Barbados
Barbuda
Belize
Bermuda
Bolivia
Brazil
British Virgin Is.
Cayman Islands
Chile
Colombia
Costa Rica
Dominica
Dominican Republic
Ecuador
Grenada
Guatemala
Guyana
Haiti
Honduras
Jamaica
Mexico
Montserrat
Netherlands Ant.
Panama
Paraguay
Peru
St. Christopher and Nevis
St. Lucia
St. Vincent and the Grenadines
Suriname
Trinidad and Tobago
Turks & Caicos Is.
Uruguay
Venezuela

ATTACHMENT A (Cont'd.)

COUNTRIES TO BE SERVED VIA PAS-1 (INTERCONNECTED)

Applicant requests authority to establish up to six (6) 64 Kbps voice grade circuits between the U.S. and the countries listed below.

(B) For Communications INTERCONNECTED with the Public Switched Network

C-band Countries

Bahamas	Dominican Republic	Panama
Costa Rica	Netherlands Ant.	Peru

Ku-band Countries

Albania	Georgia	Portugal
Armenia	Hungary	Romania
Azerbaijan	Kazakhstan	Russian Federation
Bahamas	Kyrgyzstan	Tajikistan
Belarus	Latvia	Turkmenistan
Bulgaria	Lithuania	Ukraine
Czechoslovakia	Moldova	United Kingdom
Estonia	Poland	Uzbekistan

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-352

In re Applications of

Ronald E. Patterson & Cal E. Varner
d/b/a CAPITOL CITY BROADCASTING COMPANY

File No. BPH-880812MZ

For Construction Permit
for a New FM Station on
Channel 247C2
Longview, Texas

APPEARANCES

David Tillotson on behalf of Capitol City Broadcasting Company; and *Y. Paulette Laden* on behalf of Chief, Mass Media Bureau, Federal Communications Commission.

SUPPLEMENTAL INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE WALTER C. MILLER

Issued: June 14, 1994; Released: June 21, 1994

1. Only one applicant remains: Ronald E. Patterson and Cal E. Varner d/b/a Capitol City Broadcasting Company (Capitol City).

2. Even though Judge Edward Kuhlmann granted Capitol City's application on March 17, 1992 (7 FCC Rcd 1938), and even though the Review Board affirmed that grant on March 11, 1993, (8 FCC Rcd 1726), the Commission set the grant aside and remanded the case for further hearing. See FCC 93-514 released December 7, 1993. The Commission did so after concluding that substantial and material financial and character questions exist about Capitol City's basic qualifications.

3. So they delineated four basic qualifying issues against Capitol City. If Capitol City fails to meet even one of the four added issues, their application (BPH-880812MZ) must be denied. Those factual issues are:

(a) To determine whether Capitol City was financially qualified to be a Commission licensee at the time of certification [on August 10, 1988];

(b) To determine whether Capitol City is presently financially qualified to be a Commission licensee;

(c) To determine whether Capitol City falsely certified its financial qualifications to construct and operate its proposed FM station at Longview, Texas; and

(d) To determine whether Capitol City made misrepresentations to or lacked candor before the Commission concerning its financial qualifications.

The Commission also specified the customary ultimate conclusionary issue:

(e) To determine whether, in light of the evidence adduced under the foregoing issues, Capitol City is qualified to be a Commission licensee.

4. We held our remanded prehearing conference on March 7, 1994, our remanded evidentiary admission session on March 18, 1994, and our remanded hearing on April 12, 1994. The evidentiary record was closed on April 12th.

5. Capitol City and the Mass Media Bureau each filed their Proposed Findings of Fact and Conclusions of Law on May 31, 1994. Both filed Reply Findings on June 10, 1994.

FINDINGS OF FACT
REMANDED ISSUE (a)

6. Under remanded issue (a) we must decide if Capitol City was financially qualified when they filed their application on August 12, 1988.

7. Ronald Patterson, a 50% owner of Capitol City, certified on August 10, 1988, ". . . that sufficient net liquid assets are on hand or that sufficient funds are available from committed sources to construct and operate the requested facilities for three months without revenue" (MMB Ex.1, p.6, 12, 13; Tr. 495-496).

8. A word about the Certifier. Ronald Patterson has an extensive banking background. In 1977 he graduated from Stephen F. Austin University in Nacogdoches, Texas with a masters degree in Business Administration. Later, in 1984, he graduated from the Stoner Graduate School of Banking, Rutgers University (Cap. City Ex.1; Tr. 490-491).

9. From 1982-1986, Ronald Patterson was a commercial loan officer with the Republic National Bank in Dallas, Texas. He was a Vice-President of that bank from 1984-1986. From Republic Patterson went to the Sunbelt Bank in Dallas. There he was Executive Vice-President and Chief Loan Officer. He held those positions during 1986 and in the beginning of 1987. In May 1987, Patterson became the President and Chief Executive of the Commonwealth National Bank in Mobile, Alabama, a position he held through October 1990 (Tr. 492-493).

10. Before Capitol City filed BPH-880812MZ, Ronald Patterson attended a day-long, FCC sponsored seminar in Dallas, Texas. The seminar basically focused on the FCC's 80-90 Docket. The sponsoring officials not only informed the attendees about the stations that were going to be available, but they also told them how to file for them. One of the topics they discussed was the phrase "net liquid assets."

11. Based on Findings 8-10 *supra*, an intermediate finding is warranted. At the time Capitol City filed their application, their financial certifier, Ronald Patterson fully understood the financial test that the Commission would apply. Moreover, he fully comprehended the test's component parts; e.g., "net liquid assets" and "sufficient funds available from committed sources."

12. During the hearing Capitol City's financial qualifications were challenged. Ronald Patterson responded to that challenge by submitting a declaration under penalty of perjury. He said that Capitol City's financial certification was premised on $275,000 his father, Malvin Patterson, was willing to lend Capitol City. He further swore that he

(Ronald) knew his father could lend them that amount because he had reviewed his father's financial statement about a month before he certified Capitol City's financial qualifications (MMB Ex.2, Attachments 1 and 2).

13. Capitol City provided a copy of Malvin Patterson's loan commitment letter to the Commission. But they did not (at that time) provide a copy of the financial statement that Ronald Patterson had purportedly relied on (FCC 93-514 *supra.*, para.2).[1]

14. So the Commission asked Capitol City to provide a copy of the balance sheet Ronald Patterson had reviewed. Capitol City then supplied a copy of Malvin Patterson's May, 1988 financial statement, along with a copy of a real estate schedule referred to in that statement (MMB Ex.14, pp. 5-10).

15. At this juncture Capitol City began to alter their position. They no longer stressed that Malvin Patterson was going to lend them $275,000 (See Finding 12 *supra.*). Instead they asserted that Malvin Patterson's May 1988 financial statement and the accompanying real estate schedule demonstrated his ability to liquidate his assets for the purpose of financing the proposed station (FCC 93-514 *supra.* at para.4). Capitol City further acknowledged that most of Malvin Patterson's wealth came from his real estate holdings valued at $727,000 as of May, 1988. Thus they argued that it was permissible for Malvin Patterson to rely on *non-liquid* assets to provide the funding required for the proposed station.

16. The Commission rejected Capitol City's changed position. They concluded that Malvin Patterson's 1988 financial statement does not establish that at the time of certification Malvin Patterson had sufficient net liquid assets or readily convertible non-liquid assets to meet the application's financial requirements (FCC-514 *supra.*, para 12).

17. The Commission noted: that in 1988 the bulk of Malvin Patterson's net worth of $790,654 consisted of non-liquid assets, including the $727,000 in alleged real estate values: that Capitol City had submitted no valid appraisals or affidavits substantiating the claimed value of the real estate and other non-liquid assets at the time of certification: and that Malvin Patterson's so-called self-appraisals fell far short of being acceptable (FCC 93-514 *supra.* paras. 10-12).

18. Upon further analysis the Commission then concluded that even if Capitol City had substantiated the claimed values of Malvin Patterson's non-liquid assets, that the ratio of the claimed value of all of the non-liquid assets, (including those subject to encumbrances) to the additional funds that those assets must yield was unacceptable ($760,654 to $243,000 or 3:13 to 1). See FCC 93-514 *supra.*, para.12.

19. Later, in a Reply pleading filed September 1, 1993, Capitol City admitted that Malvin Patterson, at the time of certification did not have "sufficient net liquid assets" to cover his $275,000 commitment to Capitol City, as that term is defined by the Commission. See FCC 93-514 *supra.*, para 6.

20. At the remanded hearing Capitol City was still unable to show that they were financially qualified when they filed their application on August 12, 1988. In fact, and based on the evidence adduced on remand, Capitol City was in far worse financial condition at certification time than they had led the Commission to believe they were.

21. For example, they've been asking the Commission to credit Malvin Patterson with real estate worth $727,000. Indeed, and for analytical purposes the Commission did credit Malvin Patterson's financial statement with that amount. See Findings 15, 17 and 18 *supra.*

22. But, on remand, the most, the very most, that Capitol City could substantiate in non-liquid real estate for Malvin Patterson was $401,880. That $401,880 consisted of $238,630 in income producing property and $163,350 in non-income producing property. See MMB PFs 7 and 9.[2]

23. When we apply the ratio test the Commission wants applied (See Finding 18 *supra.*), the deteriorated financial position becomes evident. The ratio of the value of non-liquid assets ($401,880) to the additional funds those assets must yield ($243,000) is 1:65 to 1, clearly an insufficient ratio. See *Texas Communications Limited Partnership*, 6 FCC Rcd 5191, 5194 n.7 (1991).

24. Obviously recognizing that their 1988 financial showing is defective under the Commission's ratio test, Capitol City now wants to apply an entirely different test, a test of its own choosing. Based on his past banking experience, Ronald Patterson asserts that his father could borrow up to 70% of the value of his rental and investment properties. That bare unsupported opinion is rejected.

25. But even if that test were credited, Capitol City would fail it. The record shows that 1988 Malvin Patterson owned $238,630 worth of income producing real estate. See Finding 22 *supra.* 70% of $238,630 is $167,041, about $76,000 short of the $243,000 required.

26. *Intermediate Findings.* Capitol City has failed to show that they were financially qualified to be a Commission licensee at the time they certified they were: i.e., on August 10, 1988. So their application must be denied.

REMANDED ISSUE (b)

27. The Commission has ruled that an applicant may not establish due diligence for a belated financial proposal, absent a demonstration that he had reasonable assurance of financing at the time of certification. See *Aspen FM*, 6 FCC Rcd at 1603-04, para.13 and cases cited there. And the Commission wants that rule applied in this case. See FCC 93-514 *supra.* at Footnote 22.

28. So having determined (Findings 6-26 *supra.*) that Capitol City wasn't qualified at the time of certification, ordinarily no findings or conclusions would be needed under remanded issue (b).

---

[1] This type of conduct is invariably a red flag. When an applicant's basic qualifications are challenged, it behooves that applicant to immediately provide *all* the data he relied on. The failure to do so arouses the suspicions of his opponents, as well as the adjudicatory bodies charged with ruling on the challenge.

[2] Capitol City provided no appraisals that would support the claimed value of Malvin Patterson's real estate in 1988. However, on remand they did provide a "drive-by" appraisal for *some* of Malvin Patterson's properties along with an *unverified* contention about how much real estate values in the general area rose between 1989-1994 (Tr.694-727). Thus, the $401,880 figure places Capitol City's 1988 showing in a most charitable light since it could easily be argued that they had failed to substantiate anything at all.

29. But, since we are interested in completeness, since we are interested in cutting down on the probability of another remand, and since we've already adduced evidence on remanded issue (b), we'll analyze and make findings on the record evidence.

30. First of all, and recognizing that Malvin Patterson would have trouble lending them $275,000 (See Findings 12, 15, and 19 *supra*.), Capitol City now claims it only needs $200,858 to construct and operate its proposal for three months without revenue. This downsizing assertion must be rejected. It strains credulity to believe that after six years of inflation (1988-1994),[3] an applicant will need $75,000 less than he originally estimated to construct and operate the operation they propose. Capitol City must be held to their original $275,000 estimate.

31. As of June 30, 1993, the bulk of Malvin Patterson's net worth of $787,607 consisted of non-liquid assets, including $747,000 in alleged real estate values. However, Capitol City has only substantiated a portion of that $747,000 with valid appraisals. They show that as of the present time Malvin Patterson has non-liquid real estate valued at $468,300. That $468,300 consists of $278,000 in income producing property, and $190,300 in non-income producing property. See MMB PFs 8-10.

32. When we apply the ratio test the Commission wants applied, we see that Malvin Patterson's ratio is unacceptable. The ratio of non-liquid assets ($468,300) to the additional funds those assets must yield ($251,755)[4] is 1:86 to 1, an insufficient ratio. See *Texas Communications Limited Partnership*, 6 FCC Rcd 5191, 5194 n.7 (1991).

33. As they did for their 1988 showing, Capitol City would apply an entirely different test, one of its own choosing (Finding 24 *supra*.). Based on his banking experience, Ronald Patterson asserts that his father could borrow up to 70% of his rental and investment properties. This bare, unsupported assertion is rejected.[5]

34. But even if that test were credited Capitol City would still fail it. The record shows that in 1993 Malvin Patterson owned $278,000 worth of income producing real estate. See Finding 31 *supra*. 70% of that $278,000 is $196,600 about $57,000 short of $251,755 required.

35. In a Reply pleading dated September 1, 1993, Capitol City admitted that Malvin Patterson does not now have sufficient net liquid assets to cover his $275,000 commitment to Capitol City, as that term is defined by the Commission. See FCC 93-514 *supra*., para.6.

36. *Intermediate Findings*. Assuming *arguendo* that Capitol City had shown that they were financially qualified at the time they certified they were, their application would still be denied. They have failed to demonstrate that they are financially qualified now. Thus their application would be denied under remanded issue (b).

REMANDED ISSUES (c) and (d)

37. Under the remanded character issues we must determine whether Capitol City has falsely certified their financial qualifications to the Commission, or made misrepresentations to or lacked candor with the Commission about their financial qualifications.

38. The 1988 statement that Ronald Patterson claims to have relied on in certifying Capitol City's financial qualifications reflected that Malvin Patterson did not have the net *liquid* assets to fund the application. See FCC 93-514 *supra*. at para. 17 and Finding 7 *supra*. Yet Ronald *repeatedly* represented that the 1988 statement established that his father had sufficient net liquid assets to fund the application. See FCC 93-514 *supra*. at para. 18.

39. Ronald Patterson submitted a statement to the Commission on April 9, 1991. There he said that "[he] was able to determine [from the 1988 financial statement] that [his father] had 'sufficient liquid assets' to provide Capitol with the proposed loan, and was able to certify that Capitol had 'sufficient net liquid assets' available to it to construct its proposed facility and operate it for three months without revenue." (MMB Ex.2).

40. Shortly thereafter, on April 26, 1991, Ronald Patterson began to waffle about what constitutes "net liquid assets." Opposing counsel asked him what types of his father's assets he considered liquid assets. Patterson replied "just his cash availability, also his borrowing capacity, his unused borrowing capacity, his line of credit, his investments in stocks and bonds."

41. Opposing counsel then asked him what he meant by ". . . net liquid assets. . ." Patterson replied ". . . assets that were unencumbered that could be quickly converted to cash in excess of the amount that I needed to build and operate this station for three months." Opposing counsel then asked ". . . assets after deducting liabilities?" Patterson answered "Yes, assets that could be converted to cash."

42. Again at the hearing Ron Patterson testified that before he certified Capitol City's financial qualifications he had assured himself that his father was sufficiently liquid to lend Capitol City the required funds. (FCC 93-514 *supra*,. para.19; Tr.106).

43. As previously noted (Findings 19 and 35 *supra*.) Capitol City has admitted that Malvin Patterson did not have at certification time and does not now have "sufficient net liquid assets" to cover his $275,000 commitment to Capitol City, as that term is defined by the Commission. See FCC 93-514 *supra*. at para. 6.

44. At the remanded hearing Patterson testified to his extensive banking background and admits having attended FCC seminars where the term "net liquid assets" was discussed. But, he says, he has always defined "net liquid assets" to include borrowing capacity, using assets as collateral. Tr. 494, 513. He *now* realizes that his definition differs

[3] Admittedly the rate of inflation has slacked off from that in the 1970s and 80s. But it still is in the 2 1/2 to 3% range per year.

[4] $275,000 minus $14,375 in cash, $5,300 in U.S. government securities, $1070 in stocks and bonds and $2,500 in cash in a corporate account. See MMB Ex. 14, pp.12-13.

[5] Certainly Lloyd C. Champion's declaration doesn't support it. See Capitol Ex.3. Champion's bank will only lend up to 70% of the appraised value of real estate when (1) appraisals confirm the aggregate value of the properties stated on the financial statement: and (2) the income stream from the properties at the time of the loan are sufficient to service the loan after covering taxes and insurance.

somewhat from that of the Commission. But he says that at the time he certified Capitol City's financial qualifications he was not aware of that distinction.

45. When he left an FCC seminar, says Ron Patterson, it was his understanding that, if his father could provide him the funds he needed, regardless of how he got them, and he (Ron) did the research to determine that his father had the ability, then the funds were "liquid." Tr. 506.

46. That explanation (Findings 44-45 *supra.*) must be summarily rejected. Ron Patterson cannot be permitted to semantically transform "non-liquid real estate values" into "net liquid assets." The Commission uses "net liquid assets" to mean ". . . the lesser amount of the current assets or of the liquid assets shown on a party's balance sheet, with net current assets being the excess of current assets over current liabilities." See FCC Form 301 Instructions, pp.5-6. At the time he certified Ron Patterson was well aware how the Commission used the term. It's sheer sophistry for him to suggest that he was unaware that the Commission's definition of "net liquid assets" differed from his own personal definition.

47. Ron Patterson was also aware that if his father's financial statement didn't show enough current and liquid assets to meet the $275,000 commitment, then that financial statement would have to be supplemented, supplemented to show how non-liquid assets will be used to provide the funds, and the extent to which such assets have liens or prior obligations against them. See FCC Form 301 Instructions, page 8. It strains credulity to believe that an experienced banker like Ron Patterson could confuse "non-appraised non-liquid real estate values" with "net liquid assets."

48. What really happened is this. It came time in the spring and summer of 1988 for Ron Patterson to financially firm up his Longview, Texas FM proposal. Monetarily he was ill-equipped to do so.[6] What little funds he had, he was committing to his Patco, Inc. project; i.e., to the operation of two combination filling stations-convenience stores. See FCC 93-514 *supra.*, para. 3 and 14; Tr. 493-494. So the truth is his father was his *only* source of funds, his *only* hope for timely launching his Longview FM application.[7]

49. That being so, you can be sure that when Ron Patterson analyzed his father's May 1988 financial statement, he (Ron) was going to conclude that his father had the financial wherewithal to lend him the $275,000 he (Ron) needed.

50. *Intermediate Findings.* On August 10, 1988, Ronald Patterson falsely certified that Capitol City had sufficient net liquid assets on hand or could get them from a committed source to construct and operate his proposed Longview FM station for three months without revenue.

51. Having falsely certified that his father had "sufficient net liquid assets" to lend him the $275,000 he needed, Ron Patterson was obliged to repeat the misrepresentation on subsequent occasions. See Findings 38-39 *supra.*

52. Later (starting on April 26, 1991), when he realized that he was going to have to include "non-liquid real estate" within his definition he began to change his definition of "net liquid assets." See Findings 40-42 *supra.* These semantical switches began to unnecessarily complicate the adjudicatory record.

53. So, on September 1, 1993, Capitol City finally admitted that Malvin Patterson did not have at the time of certification, and does not now have "sufficient net liquid assets" to cover his $275,000 commitment to Capitol City, "as that term is defined by the Commission."

54. So, not only has Capitol City falsely certified their financial qualifications under remanded issue (c), they have misrepresented to, and lacked candor with the Commission about their financial qualifications under remanded issue (d). So Capitol City's application must be denied under either remanded issue (c) or remanded issue (d).

CONCLUSIONS OF LAW

1. On December 7, 1993, the Commission remanded this case. See FCC 93-514. They delineated four basic qualifying issues against the sole remaining applicant to the proceeding, Capitol City Broadcasting Company (Capitol City).

2. In so doing, the Commission asked: (a) whether Capitol City was financially qualified to be a Commission licensee when they certified they were; (b) whether Capitol City is presently financially qualified; (c) whether Capitol City falsely certified its financial qualifications; and (d) whether Capitol City misrepresented to or lacked candor with the Commission about their financial qualifications.

3. We've held our remanded hearing, closed the evidentiary record, and the two parties (Capitol City and the Mass Media Bureau) have submitted their post-hearing pleadings.

4. *Remanded Issue (a).* Capitol City was not financially qualified when they filed BPH-880812MZ on August 12, 1988. They didn't have sufficient net liquid assets on hand, or sufficient funds available from committed sources to construct and operate the requested facilities for three months without revenue.

5. Capitol City said that Ronald Patterson's father, Malvin Patterson was willing to lend them the $275,000 they needed to finance their station. Ronald, a 50% owner in Capitol City, said that he knew his father could lend them that amount because he had reviewed his father's financial statement and his father had the net liquid assets to make the loan.

6. It developed that Malvin Patterson did not have anywhere near $275,000 in net liquid assets. While Malvin had a net worth of $790,564, the bulk of it consisted of non-liquid assets including *alleged* real estate values of $727,000. However, Capitol City could submit no valid 1988 appraisals to support the $727,000 valuation.

7. At the remanded hearing Capitol City did submit a 1994 drive-by appraisal on *some* of the properties listed in Malvin Patterson's 1988 financial statement. But the most, the very most that Capitol City could substantiate in non-

[6] The complete record more than substantiates the allegations ". . . that Ronald Patterson was virtually bankrupt. . ." See FCC 93-514 *supra.* at para. 3.

[7] This is the very reason that Ron Patterson has never submitted his own bank letter, always relying instead on his father.

liquid real estate values was $401,880, a figure considerably below the $727,000 they had originally asked the Commission to credit. That $401,880 consisted of $238,630 in income producing property, and $163,350 in non-income producing property.

8. There have been occasions when the Commission has considered readily convertible non-liquid assets in determining whether an applicant is financially qualified. See FCC 93-514 *supra*, at para.12; and Findings 18 and 47 *supra*. But Capitol City has failed to qualify under the non-liquid asset test. The ratio of the value of non-liquid assets ($401,880) to the additional funds those assets must yield ($243,000)[8] is 1:65 to 1, a grossly insufficient ratio. See *Texas Communications Limited Partnership*, 6 FCC Rcd 5191, 5194 n.7 (1991)

9. In a Reply pleading filed September 1, 1993, Capitol City finally admitted that Malvin Patterson, at the time of certification, didn't have "sufficient net liquid assets" to cover his $275,000 commitment to Capitol City, as that term is defined by the Commission. See Finding 19 *supra* .

10. Since Capitol City has failed to demonstrate that they were financially qualified to be a Commission licensee at the time of certification their application must be denied.

11. *Remanded Issue (b)*. Under Commission precedent an applicant can't establish due diligence for a belated financial proposal absent their demonstrating that they had reasonable assurance of financing at the time of certification. See Findings 27-28 *supra*. So no conclusions are required under issue (b).

12. However, since we have adduced evidence on Issue (b) at the remanded hearing, issue (b) conclusions will be offered to the appellate bodies. See Findings 29-36 *supra*.

13. Assuming *arguendo* that Capitol City had shown that it was qualified under remanded issue (a), their application would still be denied. They've failed to demonstrate that they're financially qualified now.

14. As of June 30, 1993, the bulk of Malvin Patterson's net worth of $787,607 consisted of non-liquid assets including $747,000 in alleged real estate values. However, as in the case of their 1988 claim (Conclusions 6-7 *supra*.) Capitol City could only substantiate $486,300 in non-liquid real estate values, a figure considerably below the $747,000 they want the Commission to accept. That $468,300 consists of $278,000 in income producing property, and $190,300 in non-income producing property.

15. Again applying the Commission's non-liquid ratio test, the ratio of non-liquid assets ($486,300) to the additional funds those assets must yield ($251,755) is 1:86 to 1, a grossly insufficient ratio. See *Texas Communications Limited Partnership*, 6 FCC Rcd 5191, 5194 n.7 (1991).

16. In a Reply pleading dated September 1, 1993, Capitol City admits that Malvin Patterson does not now have "sufficient net liquid assets" to cover his $275,000 commitment to Capitol City, as that term is defined by the Commission. See Finding 35 *supra*.

17. So even *if* Capitol City had shown that they were financially qualified under remanded issue (a) their application would still be denied under remanded issue (b). They're not financially qualified now.

18. *Remanded Issues (c) and (d)*. Even if Capitol City were financially qualified under remanded issues (a) and (b), their application would still have to be denied under the remanded character issues.

19. Ronald Patterson has an extensive banking background. See Findings 8-11 *supra*. At the time he certified Capitol City's financial qualifications, Ron Patterson was intimately familiar with the phrase "net liquid assets," and how the Commission employed that phrase. See Findings 46-47 *supra*.

20. Yet he swore that his father, Malvin Patterson, had "sufficient net liquid assets' to back up a $275,000 loan he (Malvin) was going to make to Capitol City. And he based that affirmation on his father's "non-liquid real estate" assets. He continued with this charade until he realized that the Commission wasn't buying that ludicrous explanation. He then argued that his definition of "net liquid assets" differed from that of the Commission, but that he didn't realize that at the time of certification. Then on September 1, 1993, he finally admitted that his father, Malvin Patterson, did not have at the time of certification and does not now have "sufficient net liquid assets" to cover his $275,000 commitment to Capitol City, as that term is defined by the Commission.

21. The Commission cannot and should not stand idly by while one of its applicants who happens to be an experienced banker semantically transforms "non-appraised, non-liquid real estate values" into "net liquid assets." To accept that transformation would be carrying regulatory hypocrisy to an extreme.

22. No, the conclusion is more than justified that Ronald Patterson willingly and falsely certified Capitol City's financial qualifications when BPH-880812MZ was filed on August 12, 1988. He continued those misrepresentations right up through the remanded hearing. His lack of candor clearly displays a propensity for unreliability and deception.

23. Ronald Patterson's ultimate alibi borders on the ridiculous. He asserts that he belatedly discovered that his own personal definition of "net liquid assets" differs from the Commission's definition. Such cavalier indifference to the accuracy of his representations to the Commission warrants approbation, not reward.

24. So even assuming that Capitol City had shown they were financially qualified under remanded issues (a) and (b), their application would still be denied for the false certification under remanded issue (c) and the continuing misrepresentations and lack of candor under remanded issue (d).

25. *Remanded Issue (e)*. Under the ultimate issue (see Finding 3 *supra*.), we must determine, in light of the evidence adduced under remanded issues (a) through (d), whether Capitol City is qualified to be a Commission licensee.

26. The answer to that question is "no." The Commission, in remanding this case (FCC 93-514 released December 7, 1993), laid four tests on applicant, Capitol City Broadcasting Company. Capitol City has failed them all. They were not financially qualified at the time they certified in their application they were; they are not pres-

[8] Capitol City has been credited with two liquid assets on Malvin Patterson's 1988 financial statement: $19,578 in cash and $10,000 in cash surrender value of life insurance.

ently financially qualified: they falsely certified that they were financially qualified to construct and operate their proposed FM station in Longview, Texas; and they have made misrepresentations to and lacked candor with the Commission about their financial qualifications.

So, unless an appeal is taken from this Supplemental Initial Decision or the Commission reviews it on its own motion, Ronald E. Patterson and Cal E. Varner d/b/a Capitol City Broadcasting Company's application (File No. BPH-880812MZ) IS DENIED.[a]

FEDERAL COMMUNICATIONS COMMISSION

Walter C. Miller
Administrative Law Judge

[a] If exceptions aren't filed within 30 days, or the Commission doesn't review the case on its own motion, this Supplemental Initial Decision will become effective 50 days after its public release. See 47 CFR 1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 93-162

In the Matter of

Local Exchange Carriers' Rates,
Terms, and Conditions for
Expanded Interconnection for
Special Access

Southern New England Telephone Company
Revisions to Tariff F.C.C. No. 39

Transmittal No. 610

MEMORANDUM OPINION AND ORDER

Adopted: June 10, 1994; **Released: June 15, 1994**

By the Acting Chief, Tariff Division, Common Carrier Bureau:

1. On May 2, 1994, the Southern New England Telephone Company (SNET) filed Transmittal No. 610 to revise its Tariff F.C.C. No. 39. SNET proposes adding one additional telephone company central office to the list of central offices where it will offer expanded interconnection service. SNET states that the purpose of this filing is to respond to a *bona fide* request from a customer for expanded interconnection service in the West Hartford 01 central office, located at West Hartford, Connecticut. Description and Justification at 1-2. No petitions were filed against this tariff. Transmittal 610 is scheduled to take effect on June 16, 1994.

2. This transmittal raises the same issues regarding cost allocations, rate levels, rate structures, and terms and conditions of service as those identified in the *Expanded Interconnection Tariff Order*.[1] Therefore, Transmittal No. 610 is suspended for one day, until June 17, 1994, and will be subject to the investigation initiated in the *Expanded Interconnection Tariff Order*. These rates will also be subject to an accounting order to facilitate any refunds that may later prove necessary.

3. Accordingly, IT IS ORDERED that, pursuant to Section 204(a) of the Communications Act of 1934, 47 U.S.C. § 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, the revisions to SNET Tariff F.C.C. No. 39, Transmittal No. 610, ARE SUSPENDED for one day and an investigation of the referenced tariff transmittal IS INSTITUTED.

4. IT IS FURTHER ORDERED that SNET SHALL FILE tariff revisions within five business days of the release date of this Order to reflect this suspension.

5. IT IS FURTHER ORDERED that, for these purposes, we waive Sections 61.56, 61.58 and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.56, 61.58, and 61.59. SNET should cite the "DA" number of the instant Order as the authority for this filing.

6. IT IS FURTHER ORDERED that, pursuant to Section 204(a) of the Communications Act of 1934, 47 U.S.C. § 204(a), SNET shall keep accurate account of all amounts received by reason of the rates that are the subject of this investigation.

FEDERAL COMMUNICATIONS COMMISSION

David A. Nall
Acting Chief, Tariff Division
Common Carrier Bureau

[1] Ameritech Operating Companies, *et. al*, CC Docket No. 93-162, 8 FCC Rcd 4589 (Com. Car. Bur. 1993) (*Expanded Interconnection Tariff Order*).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Complaint of

Jim Darnell, William Johnson
and Bobby Cronan

against

Radio Station KMAL(FM)
Malden, Missouri

STAFF RULING

Adopted: June 13, 1994; Released: June 21, 1994

By the Chief, Political Programming Branch:

1. The Commission has before it a complaint from Jim Darnell, William Johnson, and Bobby Cronan ("complainants") that station KMAL(FM), Malden, Missouri violated Section 73.1930 of the Commission's rules (political editorials) with respect to an editorial broadcast on April 5, 1993.

BACKGROUND

2. Complainants were opposing candidates in an April 6, 1993, election for Mayor of Malden, Missouri. Complainants maintain that on April 5, 1993, KMAL broadcast an editorial endorsing the candidacy of Clark Duckett, a fourth candidate in the race. Complainants contend, however, that KMAL failed to notify them of the editorial or offer them an opportunity to respond as required by Section 73.1930 of the rules.

3. KMAL's general manager, Dave Green, admits that the station broadcast the editorial, but asserts that he properly notified the complainants, and offered them a reasonable opportunity to respond. Green states that six days before the election, he mailed to each of the complainants a tape recording containing the contents of the editorial followed, on the same tape, by verbal instructions on how to obtain airtime for a response. Green further states that he placed the tapes in "a drop off [mail] box," and was assured by the Malden Post Office that they would be delivered the following day. Green concedes that he did not enclose a letter with the tapes, nor did he provide the complainants with any other written notification of the editorial.

4. Green submits statements from four individuals in support of his position. The first statement is from the music director who asserts that he recorded the tapes containing the editorial as well as instructions to the complainants on how to obtain their right to respond. The second statement is from the traffic director who maintains that she witnessed the recording of the tapes and also claims to have seen three envelopes addressed to the complainants. She states, however, that she "did not see the tapes mailed." The third statement is from the news director who contends that he discussed with Green the station's obligation to notify the complainants. The news director also states that he was informed by the music director that the tapes had been recorded and were "to be mailed to the candidates the week before the election." The fourth statement is from the general manager of another radio station who asserts that Green discussed with him the fact that KMAL would adhere to the requirements of the Section 73.1930.

5. Green states that, because KMAL planned to broadcast the editorial on April 5, he mailed the tapes to the complainants on March 31. Thus, based on his assertion that the Malden Post Office assured him the tapes would arrive the following day, Green contends that he made certain that the complainants were notified 96 hours before the broadcast of the editorial. Accordingly, Green maintains that KMAL complied with the "72 hour rule."[1] Each of the complainants denies having received a copy of the tapes.

DISCUSSION

6. Section 73.1930 of the Commission's rules states:

> (a) Where a licensee, in an editorial,
>
> (1) Endorses or,
>
> (2) Opposes a legally qualified candidate or candidates the licensee shall, within 24 hours after the editorial transmit to, respectively,
>
> (i) The other qualified candidate or candidates for the same office or,
>
> (ii) The candidate opposed in the editorial,
>
> (A) Notification of the date and time of the editorial,
>
> (B) A script or tape of the editorial and
>
> (C) An offer of reasonable opportunity for the candidate or spokesperson of the candidate to respond over the licensee's facilities. Where such editorials are broadcast on the day of the election or within 72 hours prior to the day of the election, the licensee shall comply with the provisions of this paragraph sufficiently far in advance of the broadcast to enable the candidate or candidates to have reasonable opportunity to prepare a response and to present it in a timely fashion.

47 U.S.C. Section 73.1930.

7. Assuming that Green mailed the tapes as he describes, KMAL did not fulfill the requirements of the Political Editorial Rule. KMAL had an affirmative obligation to notify the complainants of the editorial and their rights under Section 73.1930. The burden, therefore, is on KMAL to show that it has fulfilled this responsibility.

8. Green admits that he did not send written notification along with the tapes indicating their contents or informing the complainants of how to obtain their right to respond. In light of this fact, KMAL's method of notification, irrespective of whether the tapes were delivered, was inad-

[1] *See* Text of rule, paragraph 6, *infra*.

equate.[2] It is axiomatic that notification must be done in a manner which can reasonably be expected to convey the information intended to reach the recipient. The mere placement of a tape in the mail, with no accompanying written statement indicating its contents, does not satisfy this requirement. Moreover, according to Green, the offer to respond was placed on the tape after the editorial. Therefore, complainants would have had to listen to the entire editorial before they became aware that they were being informed of their rights under Section 73.1930. If we were to sanction such a policy, it would, in effect, shift the burden from the party which has the obligation to notify on to the party which has a right to *receive* the notification. We see no justification for such a policy.

9. Although we have evidence to suggest that Green intended to mail the tapes, there is insufficient grounds upon which to conclude whether or not he actually did. For the reasons stated above, however, we need not reach that question in order to conclude that KMAL has failed to fulfill its obligation under Section 73.1930 to notify the opposing candidates of the editorial it broadcast on April 5, 1993.

CONCLUSION

10. We believe it is clear from the language of Section 73.1930 that the mere mailing of a tape without any accompanying identification does not constitute the type of notification and offer required by the rule. Section 73.1930 lists the obligation to send a tape, transcript, or summary as only one of three requirements. The notification and offer of time to respond are separate requirements which cannot be met in the manner described by KMAL. Because the circumstances of this case are unusual, and the licensee apparently made an effort to comply with the Commission's rules, we will not impose a forfeiture for these violations. However, KMAL IS ADMONISHED for its failure to comply with the requirements of Section 73.1930. This letter will be made part of KMAL's permanent record at the Commission.

11. Staff action is taken here pursuant to delegated authority. Application for Review by the Commission may be requested within thirty days of the date of public notice of this ruling (see Commission Rule 1.4(b) (47 C.F.R. Section 1.4(b)) by writing the Secretary, Federal Communications Commission, Washington, D.C., 20554, stating factors warranting consideration and, if mailed, should be sent by certified mail. Copies must be sent to parties to the complaint. *See* Commission Rule 1.115 (47 C.F.R. Section 1.115).

FEDERAL COMMUNICATIONS COMMISSION

Milton O. Gross
Chief, Fairness/Political
Programming Branch
Enforcement Division
Mass Media Bureau

[2] Green claims that in two telephone conversations with the Commission staff he was informed that the method of notification which he used was adequate. It is doubtful, however, that the staff would have misinformed Green in this manner. Nevertheless, Green was not entitled to rely upon informal inquiries to the staff. *See International Broadcasting Network*, 2 FCC Rcd 2544 (1987); *P & R Temmer v. FCC*, 743 F.2d 918, 931 (D.C. Cir. 1984); and *220 Television Inc.*, 81 FCC 2d 575 (1980).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Request of

MULTIMEDIA ENTERTAINMENT, INC. 8330-MM

For Declaratory Ruling

STAFF RULING

Adopted: June 13, 1994; Released: June 21, 1994

By the Chief, Fairness/Political Programming Branch:

1. The Commission has before it a request for a declaratory ruling filed on November 8, 1993, by Multimedia Entertainment, Inc. (Multimedia). Multimedia seeks a Commission determination that news interviews broadcast during its "Jerry Springer" program (Springer) are "bona fide news interviews," exempt from the "equal opportunities" provision of Section 315(a) of the Communications Act of 1934, as amended.

2. Multimedia contends that Springer satisfies the Commission's criteria for a "bona fide news interview" exemption under Section 315(a)(2). According to Multimedia, Springer is a one-hour syndicated program distributed for broadcast Monday - Friday, to approximately 143 stations nationwide. Multimedia also states that Springer has been broadcast on a regular basis since 1991, and that news interviews are regularly scheduled on the program. Springer is filmed before a studio audience and is hosted by broadcast journalist Jerry Springer. Multimedia asserts that it retains control over the program by selecting all program topics and questions asked interviewees. Further, Multimedia contends that Mr. Springer's experience as a former news anchor and commentator enables him to control the program's format and questioning by the studio audience so as to avoid the advancement of any candidate. Multimedia states that all guests are selected on the basis of their expertise or potential audience interest and are not chosen in order to advance the candidacy of a particular person or persons. Finally, Multimedia asserts that with regard to the characteristics listed above, Springer is identical to its "Donahue" and "Sally Jessy Raphael" programs, which the Commission has held to be exempt from the "equal opportunities" provisions of Section 315(a) of the Act.[1]

DISCUSSION

3. Section 315 of the Communications Act provides that if a licensee permits a legally qualified candidate for public office to use a broadcast station, it must afford equal opportunities to other such candidates for that office. In 1959, Congress, in an effort to encourage increased news coverage of political campaign activity, amended Section 315 to exempt from equal opportunities appearances by legally qualified candidates on the following news programs:

> (1) bona fide newscast,
>
> (2) bona fide news interview,
>
> (3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or
>
> (4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto).

47 U.S.C. Section 315(a)(1-4). In determining whether a program qualifies as a "bona fide news interview", the Commission considers the following factors: (1) whether it is regularly scheduled; (2) whether the broadcaster or an independent producer controls the program; and (3) whether the broadcaster's or independent producer's decisions on the format, content and participants are based on newsworthiness rather than on an intention to advance an individual's candidacy. *See Request for Declaratory Ruling on Independently Produced News Interviews*, 7 FCC Rcd 4681 (1992).

4. Based on the information contained in Multimedia's request, it appears that the news interview segments of Springer are exempt from equal opportunities as bona fide news interviews under Section 315(a)(2). Springer has been regularly scheduled since 1991. The Commission has recognized that regularly scheduled programs that do not exclusively address current events, but which do include "bona fide" news interviews on a regular basis are eligible for the "news interview" exemption.[2] Multimedia represents that news interviews are regularly scheduled on Springer. Multimedia also represents that it retains control over the program's topics and questions asked interviewees and that the program's host is able to control audience participation and program content during the show. Moreover, according to Multimedia, all topics are selected on the basis of newsworthiness in the exercise of the producer's reasonable good faith judgment, with no intent to further any candidacy.

5. In view of the foregoing considerations, we believe that to the extent Multimedia regularly produces, and licensees regularly schedule for broadcast, bona fide news interviews, such program segments containing bona fide news interviews are exempt from Section 315(a) of the Communications Act. Accordingly, Multimedia's instant request as specified above is GRANTED.

6. Staff action is taken here pursuant to delegated authority.

---

[1] *Multimedia Entertainment, Inc.*, 56 RR 2d 143 (1984) ("Donahue"); *Multimedia Entertainment, Inc.*, 68 RR 2d 1545 (1987) ("Sally Jessy Raphael").

[2] *Multimedia Entertainment Inc.*, 56 RR 2d 143, 148 (1984).

FEDERAL COMMUNICATIONS COMMISSION

Milton O. Gross
Chief, Fairness/Political
Programming Branch
Enforcement Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Request of

KQED, Inc., Licensee of Station
KQED(TV), San Francisco, California

For Declaratory Ruling

STAFF RULING

Adopted: June 13, 1994; Released: June 21, 1994

By the Chief, Fairness/Political Programming Branch:

1. The Commission has before it a request for a declaratory ruling filed on April 1, 1994, by KQED, Inc., ("KQED") licensee of noncommercial station KQED(TV), San Francisco, California. KQED asks us to rule that appearances by legally qualified candidates for public office as guests on its "Face to Face" program are exempt from the "equal opportunities" provision of Section 315(a) of the Communication Act of 1934, as amended.

2. KQED states that since May 1993 it has produced and broadcast a weekly half-hour program called "Face to Face." KQED explains that each week it selects a newsworthy topic and two guests who reflect opposing viewpoints on the topic. KQED states that the hosts change every three weeks and the guests change weekly. At the beginning of the program, each host states his or her views on the selected topic, and during the program each host questions the guests to elicit their views. KQED also states that there is sometimes "give-and-take discussion" among the hosts and guests concerning the selected topic. KQED maintains that the producer can electronically communicate with the hosts if necessary. The program is taped for broadcast later that day.

3. KQED asserts that it exercises editorial control of the program in that it establishes the format, selects the topics, hosts and guests, and provides guidance to the hosts concerning the issues to be discussed. KQED maintains that decisions as to the program's content and participants are based on KQED's good faith journalistic judgment regarding the newsworthiness of the topics rather than the political advantage of any candidate who may appear as a guest.

DISCUSSION

4. Section 315(a) of the Communications Act provides that if a licensee permits a legally qualified candidate for public office to use a broadcast station, it must afford equal opportunities to other such candidates for that office. In 1959, Congress amended Section 315 to exempt from equal opportunities appearances by legally qualified candidates on the following programs:

> (1) bona fide newscast,
>
> (2) bona fide news interview,
>
> (3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or
>
> (4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto).

47 U.S.C. Section 315(a)(1-4). In determining whether a program qualifies as a "bona fide news interview", the Commission considers the following factors: (1) whether it is regularly scheduled; (2) whether the broadcaster or an independent producer controls the program; and (3) whether the broadcaster's or independent producer's decisions on format, content and participants are based on newsworthiness rather than on an intention to advance an individual's candidacy. *See Request for Declaratory Ruling on Independently Produced News Interviews*, 7 FCC Rcd 4681 (1992).

5. Based on the information contained in KQED's request, it appears that the "Face to Face" program is exempt from equal opportunities as a bona fide news interview under Section 315(a)(2). "Face to Face" has been regularly scheduled for over a year. In addition, KQED represents that it retains control over the program's topics, hosts, and guests. According to KQED, all topics and participants are selected on the basis of newsworthiness in the exercise of the producer's reasonable good faith judgment, with no intent to further any candidacy. While KQED acknowledges that the specific questions asked by the hosts are not pre-screened, KQED contends that it maintains control of the program's contents by taping the program prior to broadcast, thereby permitting it to edit any portion that it so chooses.

6. In view of the foregoing considerations, we believe to the extent that KQED regularly produces and schedules for broadcast bona fide news interviews on "Face to Face," the program is exempt from Section 315(a) of the Communications Act.[1] Accordingly, KQED's request as specified above IS GRANTED.

7. Staff action is taken pursuant to delegated authority.

[1] The exemption would apply only to appearances by the guests on the program. The appearance of any host who was a legally qualified candidate would not be exempt. *See Branch v. FCC*, 824 F.2d 37 (1987), *cert. denied*, 108 S. Ct. 1220 (1988).

FEDERAL COMMUNICATIONS COMMISSION

Milton O. Gross
Chief, Fairness/Political
Programming Branch
Enforcement Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Complaint of

Senator John F. Kelly

against

Station WXYZ-TV, Detroit, Michigan

STAFF RULING

Adopted: June 13, 1994; Released: June 22, 1994

By the Chief, Fairness/Political Programming Branch:

1. We have before us a Petition for Reconsideration of our dismissal of a complaint by Michigan State Senator John F. Kelly against station WXYZ-TV, Detroit, Michigan. *Senator John F. Kelly*, 7 FCC Rcd 5216 (1992). Kelly was a candidate in the (August 4, 1992, Democratic primary for a seat in the U.S. House of Representatives from Michigan. Kelly alleged that WXYZ-TV improperly denied his equal opportunities request, made pursuant to Section 315(a) of the Communications Act of 1934, as amended, 47 U.S.C. Section 315(a). Section 315(a) requires that if a broadcast station permits a legally qualified candidate to "use" its facilities, it shall provide equal opportunities to all other legally qualified candidates for such office. An opponent of Kelly, Congressman John Conyers, appeared on WXYZ-TV in a series of promotional advertisements aired between July 10 and July 24, 1992, for a special news documentary which the station was presenting on the twenty-fifth anniversary of the 1967 Detroit riots. On July 22, 1992, Kelly requested a right of equal opportunities from WXYZ-TV as a result of Conyers' appearance in the promotional (advertisements. WXYZ-TV denied his request, maintaining that a "use" did not occur because Conyers did not approve his appearance in the program promotions.

2. In a letter dated July 31, 1992, we stated that Conyers' appearances did not meet the definition of a "use" under Section 315(a) and, therefore, WXYZ-TV was under no obligation to provide Kelly with equal opportunities. The Commission had recently revised its definition of a "use" to require that the appearance be "controlled, approved, or sponsored" by the candidate. *Codification of the Commission's Political Programming Policies*, 7 FCC Rcd 678, 685 (1991), *recon. granted in part*, 7 FCC Rcd 4611 (1992).[1] Previously, the Commission had defined a "use" as any appearance in which a legally qualified candidate was recognizable to the public. *The Law of Political Broadcasting and Cablecasting: A Political Primer*, 100 FCC 2d 1476 (1984). Kelly made no showing that Conyers controlled, approved, or (sponsored his appearance in the promotional advertisements. In (this connection, Kelly had alleged that a WXYZ-TV reporter told him that Conyers had approved the use of his image in the spots. However, because Kelly furnished no proof beyond his bare assertion, we stated that we had insufficient information before us to conclude that a *prima facie* case had been established to show that Conyers had approved his appearance.

3. On September 8, 1992, Kelly filed a Petition for Reconsideration of the Bureau's decision. He argues that the Bureau erroneously determined that a "use" could not occur unless Conyers had approved his appearance. In this respect, Kelly contends that the Commission erred when it revised the definition of a "use." Kelly also argues that the Bureau's determination that he failed to make a *prima facie* case was in error, and that we should have accepted his allegation that Conyers had approved his appearance. Kelly requests that the Bureau reinstate the definition of a "use" in Section 315(a) to its former meaning or, in the alternative, find that the Bureau should have conducted a formal investigation of Kelly's complaint.

4. WXYZ-TV filed an Opposition to the Petition contending that the Bureau's decision was correct. WXYZ-TV also submitted a sworn statement from Mr. Jim Harrington, the reporter who had allegedly told Kelly that Conyers had approved his appearance in the promotional advertisements. Harrington states that he did not attempt to obtain Conyers' consent for the use of his image in the spots, nor did the two ever discuss the matter. WXYZ-TV also submitted a sworn statement from the producer of the spots asserting that it is not the policy of the station to secure the consent of individuals appearing in promotional advertisements for news programs.

5. At the time the promotional spots aired, the Commission's rules required that for a "use" to occur, a candidate must control, approve, or sponsor his or her appearance. Kelly presents no persuasive or substantive evidence, beyond the aforementioned bare allegation, that Conyers exercised such control or approval. Moreover, WXYZ-TV supports its argument in its response to the Commission with statements by its employees contradicting Kelly's assertion. Accordingly, there is nothing before us which warrants reversal of this aspect of our decision.

6. As to Kelly's request that reinstate the Commission's former definition of a "use," we note that Kelly filed as an intervenor in a petition for judicial review of the Commission's revised definition. *See Westen v. FCC*, No. 93-70041 (9th Cir., filed Jan. 22, 1993), *dismissed*, Feb. 25, 1994. In response to this petition, the Commission decided that it would undertake a more comprehensive examination of the issue, and in the meantime, return to the previous interpretation of a "use." *Codification II*, 9 FCC Rcd 651, 652 (1994). This change became effective on April 28, 1994. Accordingly, Kelly's request that the Bureau reinstate the definition of "use" to its former meaning is now moot.

7. In light of the above, the Petition for Reconsideration IS DENIED to the extent indicated above and is otherwise DISMISSED AS MOOT.

[1] The revised definition became effective on January 4, 1992.

FEDERAL COMMUNICATIONS COMMISSION

Milton O. Gross
Chief. Fairness/Political
Programming Branch
Enforcement Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Request of

THE PACIFICA FOUNDATION

For Declaratory Ruling

STAFF RULING

Adopted: June 13, 1994; Released: June 22, 1994

By the Chief, Political Programming Branch:

1. The Commission has before it a request for a declaratory ruling filed by The Pacifica Foundation ("Pacifica"),[1] seeking a Commission determination that its five-part "Pacifica Radio Town Hall Meetings" (Town Hall Meetings) series is a "bona fide news interview" program, exempt from the "equal opportunities" provision of Section 315(a) of the Communications Act of 1934, as amended.[2]

BACKGROUND

2. According to Pacifica, Town Hall Meetings is a series of two-hour programs, scheduled for broadcast on Pacifica stations at regular intervals during the months prior to general election periods.[3] In addition, the series is offered live via satellite to other non-commercial stations at a nominal charge.

3. The format of Town Hall Meetings is a round-table discussion, moderated by a Pacifica employee. Prepared statements by the participants are not permitted. A call-in segment is included, and Pacifica screens each telephone call. Pacifica retains control of the telephone calls and the general content of the programs. Pacifica also asserts that it selects newsworthy topics and interviewee participants based on its good faith journalistic judgment and not on an intention to further any candidacy. Interviewees and panelists include members of Congress and the state legislature, scholars, candidates for various offices, community leaders, and journalists.

DISCUSSION

4. Section 315(a) of the Communications Act provides that if a licensee permits a legally qualified candidate for public office to "use" a broadcast station (make an identifiable appearance by picture or voice), it must afford "equal opportunities" to all other legally qualified candidates for that office. In 1959, Congress, in an effort to encourage increased news coverage of political campaign activity, amended Section 315 to exempt from the equal opportunities obligation, appearances by legally qualified candidates on the following news programs:

> (1) bona fide newscast,
>
> (2) bona fide news interview,
>
> (3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or
>
> (4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto).

47 U.S.C. Section 315(a)(1-4).

5. In determining whether a program qualifies as a "bona fide news interview," the Commission considers the following factors:

> (1) whether it is a regularly scheduled program; (2) whether the program producer exercises control over the programming sufficient to prevent a candidate from taking control; and (3) whether decisions on the format, content, and participants are based on reasonable, good faith journalistic judgment of newsworthiness, rather than on an intention to advance an individual's candidacy.[4]

6. Based on the information contained in the Pacifica request, it appears that Town Hall Meetings is exempt from the equal opportunities obligation as a bona fide news interview program under Section 315(a)(2). The limited five-part duration of Town Hall Meetings is not a bar to its being considered as regularly scheduled. In a variety of cases, the Commission has granted exempt status requests to news interview program series scheduled for a limited number of broadcasts, particularly where, as here, essentially the same series was broadcast previously and is planned for broadcast on a recurrent yearly basis.[5] *U.S News and World Report, L.P.*, 2 FCC Rcd 7101 (1987)(12-part series); *NBC, Inc.*, 56 RR2d 958 (M. Med Bur. 1984)(11-part series); *Storer Broadcasting Co.*, 58 FCC 2d 982 (B/c Bur. 1976)(quarterly series).

---

[1] Pacifica is the licensee of several non-commercial radio stations.

[2] Because the 1992 election campaign had already begun, and since the facts herein were substantially similar to those in previous rulings granting an exemption, counsel for Pacifica was informally advised by a staff attorney on March 9, 1992, that Town Hall Meetings appeared to satisfy the requisites for the news interview exemption.

[3] In 1992 and 1993, the series aired between June 1 and October 29. Pacifica notes that an essentially identical five-part series format, "Home Front: Pacifica's Town Hall Meetings," was broadcast June through October 1991. Pacifica also stated that it plans to broadcast the series on a yearly basis to air during approximately the same time period.

[4] In a decision released subsequent to Pacifica's request, the Commission held that licensee production control is no longer required. *See Declaratory Ruling*, 7 FCC Rcd 4681 (1992).

[5] In *Aspen Institute*, 55 FCC 2d 697, 709 (1975), the Commission stated that a regularly scheduled program under Section 315(a)(2)is a "program which a licensee or network initiates and schedules for regular, recurrent broadcast, rather than a program which covers an event."

7. Pacifica also represents that it retains control over the program's topics and questions asked of the interviewees and that the program's host is able to control audience phone-in participation and program content during the program. Moreover, it appears that all topics and guests are selected on the basis of their newsworthiness in the exercise of Pacifica's reasonable, good faith judgment, with no intent to further any candidacy. We have no basis to question any of Pacifica's assertions and find that they satisfy the requisites of the news interview exemption.

8. In view of the foregoing considerations, we believe that the Town Hall Meetings series is exempt from Section 315(a) of the Communications Act as a bona fide news interview program. Accordingly, Pacifica's request as specified above IS GRANTED.

9. Staff action is taken here pursuant to delegated authority under Sections 0.283 and 0.284(a)(1) of the Commission's rules.

FEDERAL COMMUNICATIONS COMMISSION

Milton O. Gross
Chief, Fairness/Political
Programming Branch
Enforcement Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
June 15, 1994

Released: June 22, 1994

Randal R. Collett
Executive Vice President
Association of College and University
Telecommunications Administrators
152 W. Zandale Drive
Suite 200
Lexington, KY 40503

Dear Mr. Collett:

This is in response to your recent correspondence on behalf of the Association of College and University Telecommunications Administrators (ACUTA). You describe problems encountered by colleges and universities in connection with billings for calls to 800 numbers. Your letter, as well as numerous other complaints received by the Common Carrier Bureau, recounts instances of telephone subscribers being charged on monthly telephone bills for information services received by third parties during calls to 800 numbers placed from a subscriber's telephone line but without that subscriber's knowledge or consent. You ask the Commission to prohibit the use of 800 numbers for all interstate information services. If a total ban on 800 number information services is not deemed to be feasible, you suggest that the Commission prohibit local exchange companies (LECs) from billing for interstate 800 number information services without first obtaining written confirmation that the party who is to be billed for such services has actually agreed to use and be billed for the services. You also ask that we specifically forbid issuance of telephone calling cards for information services without the express permission of subscriber to the originating telephone line.

Your letter highlights a serious and growing problem. During the period from December 1, 1993 and April 20, 1994, the Bureau received 736 written complaints regarding 800 number information services charges. In addition, telephone inquiries and complaints are received daily. Although many complaints have been received from individual residential subscribers, a large number are from business customers, especially hotels and motels and colleges and universities such as those represented by ACUTA. These complaints appear to indicate that the manner in which 800 numbers are being used to provide information services is not in accordance with the Commission's rules.

As you no doubt are aware, the Commission's rules governing pay-per-call and similar services were adopted last year to implement the provisions of the Telephone Disclosure and Dispute Resolution Act (TDDRA). *See Policies and Rules Implementing the Telephone Disclosure and Dispute Resolution Act*, CC Docket No. 93-22, 8 FCC Rcd 6885 (1993) (*Pay-Per-Call Report and Order*). The TDDRA and this Commission's parallel regulations place strict limitations on the use of 800 numbers to provide information services for which callers are assessed charges. Basically, charges can be assessed for calls to 800 numbers only when a caller enters into a "presubscription or comparable arrangement" with an information provider (IP). Under the TDDRA, information services provided under a presubscription or comparable arrangement are not subject to the wide range of provisions governing interstate pay-per-call services. The Commission set specific standards governing the establishment of presubscription arrangements in an effort to diminish incentives for unscrupulous IPs to claim presubscription simply as a means to evade pay-per-call regulations. Section 64.1501(b) of our rules, 47 C.F.R. § 64.1501(b), defines a presubscription or comparable arrangement as a contractual agreement in which (1) the service provider clearly and conspicuously informs a consumer of the terms and conditions under which the service is offered, including the rates to be charged and the service provider's name, address, and business telephone number through which additional information may be obtained or a complaint registered; (2) the service provider agrees to notify the consumer of any future rate changes; (3) the consumer agrees to use the service on the terms and conditions disclosed by the service provider; and (4) the service provider requires the use of an identification number (PIN) or other means to prevent unauthorized access to the service by non-subscribers. Authorizing charges to be billed to a credit or charge card subject to the dispute resolution procedures of the Truth in Lending Act and Fair Credit Billing Act is specifically recognized as creating a presubscription or comparable arrangement. Finally, a presubscription arrangement may not be established during a telephone call for which information services charges are assessed.

Notwithstanding these requirements, many telephone subscribers apparently are being charged for purportedly presubscribed information services, even though the subscriber has not entered into a presubscription arrangement and, in fact, is typically unaware that information services were ever provided. IPs apparently read the Automatic Number Identification (ANI) of an originating telephone line and immediately issue a PIN to a caller without ascertaining that the individual is both the subscriber to the originating line and legally capable of entering into a contractual agreement. The subscriber to the originating line is then charged for a call to the IP on the basis of ANI.

That procedure does not create a legitimate presubscription or comparable arrangement. The threshold requirement for a presubscription arrangement is that it be a "contractual agreement" between a consumer and an IP. A caller cannot legally establish an arrangement that binds another party - the subscriber to the originating line - to terms and conditions unknown to and unaccepted by that party. While the Commission declined to prohibit expressly any use of ANI in billing for presubscribed 800 number information services, the basic terms of the presubscription definition preclude reliance on ANI either to create or provide evidence of a valid presubscription or comparable arrangement, because ANI identifies only the originating line and not the caller who seeks to establish an arrangement. Thus, billing systems based solely or primarily on ANI do not ensure that presubscribed information services charges are being properly assessed.

Enforcement Division personnel have discussed our concerns about the extensive abuses in this regard with both interexchange carriers that transmit 800 number information services and LECs that bill subscribers for such services. LECs that continue to bill a subscriber for information services, notwithstanding the subscriber's assertion that no valid presubscription agreement exists between the IP and the subscriber, appear to be engaging in an unjust and unreasonable practice. We will take enforcement action as needed to ensure that consumers are not subjected to this abusive activity. We are currently assessing what other measures, including those you have suggested, may be necessary to ensure that telephone subscribers are adequately protected from fraudulent information services charges. Amendment of the Commission's rules would be necessary to institute a total ban on the use of 800 numbers to provide information services, limit the use of information services calling cards, or impose additional requirements on LECs that bill telephone subscribers for such services.

I want to assure you that while these issues are pending, the Enforcement Division will continue to handle complaints that allege that information services charges have been unlawfully assessed. I also want to reiterate here our view that the manner of providing information services that is outlined in your letter and described above does not comply with Sections 64.1501 and 64.1504 of our rules. Even if an IP has ascertained that a caller is legally competent to enter into a contractual agreement, disclosed the necessary information regarding the terms and conditions under which the service will be offered, obtained the caller's consent to receive service under such terms, properly issued a PIN, and required the caller to place another call before charges are assessed, presubscription is not established if a party other than the caller is billed for the services. A caller simply cannot establish a contractual agreement that is binding on any other party. Presubscribed information services cannot be properly billed by systems that assess charges to a subscriber to an originating line without confirming that that individual has affirmatively chosen to receive information services through a presubscription arrangement. The *Pay-Per-Call Report and Order* clearly states that when a subscriber disputes charges for allegedly presubscribed information services, the IP bears the burden of demonstrating the existence of a valid presubscription arrangement. 8 FCC Rcd at 6888. Consumers should also be aware that although IPs may seek to collect unpaid charges, common carriers may not disconnect, or interrupt in any way, local or long distance telecommunications services for failure to pay charges for presubscribed information services. *See* 47 C.F.R. § 64.1507(b).

I trust this information will be helpful to you. Your suggestions will be fully considered as we seek to determine the most effective means to curb abuses involving the use of 800 numbers for information services.

Sincerely,

Gregory A. Weiss
Acting Chief
Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

GC Docket No. 92-52

In the Matter of

Reexamination of the Policy	RM-7739
Statement on Comparative	RM-7740
Broadcast Hearings	RM-7741

SECOND FURTHER NOTICE OF PROPOSED RULEMAKING

Adopted: June 13, 1994; Released: June 22, 1994

Comment Date: July 22, 1994
Reply Date: August 8, 1994

By the Commission: Commissioners Ness and Chong not participating.

I. INTRODUCTION

1. In this notice, we solicit further comments on the modification of the criteria used in comparative hearings to award construction permits for new broadcast facilities. We ask commenters in this proceeding to address several additional questions arising from *Bechtel v. FCC*, 10 F.3d 875 (D.C. Cir. 1993).

II. BACKGROUND

2. We initiated this proceeding to reform the criteria used to select among mutually exclusive applicants for new broadcast facilities. *Reexamination of the Policy Statement on Comparative Broadcast Hearings*, 7 FCC Rcd 2664 (1992). *See also Reexamination*, 8 FCC Rcd 5475 (1993). We noted that these criteria had not been comprehensively examined for 27 years and that changes in the broadcast marketplace, in broadcast technology, and in the Commission's regulatory policies for broadcasting now warranted reexamination of the criteria. 7 FCC Rcd at 2664 ¶ 2.

3. In response to our notice of proposed rulemaking, we received numerous comments concerning: (1) whether the existing comparative criteria should be modified or eliminated; (2) whether new criteria should be adopted; and (3) whether the Commission should adopt a point system with a tie-breaker to decide comparative cases. These comments are currently under consideration.

4. Recently, the United States Court of Appeals for the District of Columbia Circuit issued a decision regarding the Commission's comparative process in *Bechtel v. FCC*, 10 F.3d 875 (D.C. Cir. 1993).[1] The court ruled that the integration of ownership into management, one of the principal criteria used in evaluating applicants for new broadcast facilities, is arbitrary and capricious and therefore unlawful. The court directed the Commission to evaluate applications before it under standards free of the integration criterion.

5. Because integration and factors deemed to enhance integration have been decisionally significant in many recent comparative proceedings, we stayed pending cases while we considered appropriate action responsive to the court's opinion. *Public Notice*, FCC 94-41 (Feb. 25, 1994).[2]

III. DISCUSSION

6. The court's opinion in *Bechtel* clearly has relevance to our efforts in this rulemaking to reform the comparative process. Not only has the court invalidated a factor central to the Commission's comparative process, but the court's analysis raises questions potentially bearing on other comparative criteria as well. Thus, although the comments already received provide useful guidance for the Commission, we find it desirable to solicit further comments in light of *Bechtel*.

7. The commenters should address how the Commission can comply with *Bechtel*. They should consider what objective and rational criteria can be used to evaluate the applicants' comparative qualifications in light of *Bechtel*. In particular, the commenters should address the impact of *Bechtel* on the factors previously considered to enhance integration: local residence and civic participation, minority status,[3] and broadcast experience. The commenters should also discuss the relative weight that should be given to the various comparative criteria in an analysis that does not rely on integration.

8. Additionally, commenters should address the procedural ramifications of applying a revised comparative analysis to pending cases. For example, commenters may wish to consider under what circumstances it would be appropriate to permit applicants in pending cases to amend their proposals in light of newly-adopted standards and when further evidentiary proceedings would be warranted.

9. Finally, in responding to this notice, commenters may wish to consider how any proposed revision of the comparative analysis could be structured to satisfy the kind of concerns which, in *Bechtel*, resulted in a determination that integration was arbitrary and capricious.[4]

---

[1] In initiating this rulemaking, the Commission took note of an earlier decision by the court in the *Bechtel* case. 7 FCC Rcd at 2664 ¶ 4. *See Bechtel v. FCC*, 957 F.2d 873 (D.C. Cir. 1992).

[2] At that time, further appropriate action included the possibility of seeking Supreme Court review of *Bechtel*. Since then, the Commission has decided not to appeal *Bechtel*, and the case has has become final. We have concluded that further action in this proceeding is the appropriate means of responding to *Bechtel*.

[3] Our policy of awarding minority preferences is subject to language which Congress has, since 1987, included in appropriations legislation prohibiting the Commission from repealing or reexamining its policies to expand minority ownership in broadcasting. Pub. L. 103-121, 107 Stat. 1153 (Oct. 27, 1993). Accordingly, as we explained in our original notice of proposed rulemaking, this proceeding will not occasion any diminution of the credit that minorities currently receive in comparative proceedings or otherwise weaken the Commission's commitment to expand minority ownership. 7 FCC Rcd at 2667 ¶ 24.

[4] One of the bases cited by the court for questioning the

IV. PROCEDURAL MATTERS

A. EX PARTE RULES -- NON-RESTRICTED PROCEEDING

10. This is a non-restricted notice and comment rulemaking proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in the Commission rules.

B. REGULATORY FLEXIBILITY ACT

11. An Initial Regulatory Flexibility Analysis is set forth in 7 FCC Rcd at 2671.

C. AUTHORITY

12. Authority for this rulemaking action is contained in 47 U.S.C. §§ 154(i), 154(j), 303(r), 309(g), 309(i), 403.

V. ORDERING CLAUSES

13. ACCORDINGLY, IT IS ORDERED, That NOTICE IS HEREBY GIVEN of the proposed regulatory changes described above, and that COMMENT IS SOUGHT on these proposals.

14. IT IS FURTHER ORDERED, That pursuant to applicable procedures set forth in sections 1.415 and 1.419 of the Commission's Rules, comments SHALL BE FILED on or before **July 22, 1994** and reply comments SHALL BE FILED on or before **August 8, 1994.** To file formally in this proceeding, commenters must file an original and four copies of all comments, reply comments, and supporting comments. If commenters want each Commissioner to receive a personal copy of their comments, they must file an original plus nine copies. Comments and reply comments should be sent to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. In addition, commenters should file a copy of any such pleadings with the Office of General Counsel, Room 610, 1919 M Street, N.W., Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center, 1919 M Street, N.W., Washington, D.C. 20554.

15. For further information, contact David S. Senzel, (202) 632-7220, Office of General Counsel.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

---

integration criterion was that, despite the Commission's long experience with integration, it had no empirical data as to integration's efficacy in promoting the public interest. We invite commenters to submit any empirical data they might have concerning the comparative process or criteria or, alternatively, to submit any anecdotal evidence of the criteria's efficacy.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-294

In the Matter of

Amendment of Section 73.202(b), RM-8342
Table of Allotments,
FM Broadcast Stations.
(Alexander City, Alabama and
West Point, Georgia)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: June 9, 1994; Released: June 22, 1994

By the Acting Chief, Allocations Branch:

1. Before the Commission for consideration is the *Notice of Proposed Rule Making*, 8 FCC Rcd 8503 (1993), issued in response to a petition filed by Solar Broadcasting Company, Inc. ("petitioner"), licensee of Station WSTH-FM, Channel 291C1, Alexander City, Alabama, proposing to change its community of license to West Point, Georgia, and to modify the license of Station WSTH-FM accordingly, pursuant to the provisions of Section 1.420(i) of the Commission's Rules. Petitioner filed comments in response to the *Notice* requesting the withdrawal of its proposal to change the community of license of Station WSTH-FM from Alexander City, Alabama, to West Point, Georgia.[1] Radio Valley, Inc. ("RVI"), licensee of Stations WCJM(FM) and WPLV(AM), West Point, Georgia, filed comments in opposition to the proposal. No other comments were received.

2. As stated in the Appendix to the *Notice*, a showing of continuing interest is required before a channel will be allotted. Based upon the petitioner's withdrawal of interest in pursuing its proposal, and in accordance with Commission policy, we will grant petitioner's request to withdraw its rule making proposal.[2] *See Grundy Center, Iowa*, 4 FCC Rcd 1275 (1989).

3. Accordingly, IT IS ORDERED, That the petition for rule making filed on behalf of Solar Broadcasting Company, Inc. (RM-8342) seeking the reallotment of Channel 291C1 from Alexander City, Alabama, to West Point, Georgia, IS DISMISSED.

4. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

5. For further information concerning the above, contact Nancy Joyner, Allocations Branch, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] Pursuant to Section 1.420(j) of the Commission's Rules, petitioner states that it has received no reimbursement of expenses or other consideration in exchange for withdrawing its expression of interest.

[2] In light of this action, the comments of RVI are moot, and will not be discussed.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

SPRINT COMMUNICATIONS COMPANY L.P. File No. I-T-C-94-240

Application for authority to acquire and operate facilities for service between the U.S. and Morocco and Bahrain.

ORDER AND AUTHORIZATION

Adopted: June 8, 1994; Released: June 22, 1994

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of direct service between the U.S. and Bahrain and Morocco by Sprint Communications Company L.P. (Sprint).

2. Accordingly, IT IS ORDERED that application File No. I-T-C-94-240 IS GRANTED and Sprint is authorized to:

a. lease from Comsat and operate one 2.048-Mbps satellite circuit between the Beeline, Florida earth station and an appropriate INTELSAT satellite over the Atlantic Ocean, connecting with similar circuits between the satellite and an earth station in Bahrain furnished by Sprint's correspondent in Bahrain;

b. own and operate one 2.048-Mbps circuit in the Beeline earth station to be used in conjunction with the satellite space segment capacity;

c. own and operate one 2.048-Mbps connecting circuit between the Beeline earth station and Sprint's New York City operating center;

d. use facilities in a, b and c above to provide Sprint's regularly authorized services including switched voice service, between the U.S. and Bahrain;

e. lease from Comsat and operate one 1.024-Mbps satellite circuit between the Shenandoah, Virginia earth station and an appropriate satellite over the Atlantic Ocean, connecting with a similar circuit between the satellite and an appropriate earth station in Morocco, furnished by Sprint's correspondent in Morocco;

f. own and operate one 1.024-Mbps circuit in the Shenandoah earth station to be used in conjunction with the space segment capacity;

g. own and operate one 1.024-Mbps circuit between the Shenandoah earth station and Sprint's New York City operating center; and

h. use the facilities in e, f and g above to provide Sprint's regularly authorized services, including switched voice service, between the U.S. and Morocco.

3. IT IS FURTHER ORDERED that our authorization of Sprint to provide private lines as part of its authorized services is limited to the provision of such private lines only between the United States and Bahrain or Morocco -- that is, private lines which originate in the United States and terminate in Bahrain or Morocco or which originate in Bahrain or Morocco and terminate in the United States. In addition, Sprint may not -- and Sprint's tariff must state that its customers may not -- connect private lines provided over these facilities to the public switched network at either the U.S. or Bahrain or Morocco end, or both, for the provision of international basic telecommunications services, including switched voice services, unless authorized to do so by the Commission upon a finding that Bahrain or Morocco affords resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates, Phase II, First Report and Order*, 7 FCC Rcd 559 (1991) *petitions for reconsideration pending*.

4. IT IS FURTHER ORDERED that neither Sprint nor any persons or companies directly or indirectly controlling or controlled by Sprint, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions, which is denied to any other United States carrier by reason of any concession, contract, understanding, or working arrangement to which Sprint or any persons or companies controlling or controlled by Sprint are parties.

5. IT IS FURTHER ORDERED that applicant shall file copies of any operating agreement it enters into with its foreign correspondent with the Commission within 30 days of its execution, and shall otherwise comply with the filing requirements contained in Section 43.51 of the Commission's Rules, 47 C.F.R. §43.51.

6. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to §203 of the Communications Act, 47 U.S.C. §203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the service authorized in this Order.

7. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

8. IT IS FURTHER ORDERED that the applicant shall file semi-annual circuit reports pursuant to Section 63.15(b) of the Commission's Rules, 47 C.F.R. §63.15(b).

9. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to ensure nondiscriminatory use of, and equitable access to, the communications satellite system.

10. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

IAN, INC. File No. I-T-C-94-241

Application for authority to acquire
and operate facilities for service
between the U.S. and the Philippines.

ORDER AND AUTHORIZATION

Adopted: June 8, 1994; Released: June 22, 1994

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of direct service between the U.S. and the Philippines by IAN, Inc.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-94-241 IS GRANTED and IAN is authorized to:

a. lease from Comsat and operate 8-64 Kbps satellite circuits between an appropriately licensed U.S. earth station and an appropriate INTELSAT satellite over the Pacific Ocean, connecting with similar circuits between the satellite and an earth station in the Philippines furnished by IAN's correspondent in the Philippines;

b. acquire and operate 8-64 Kbps circuits in the earth station to be used in conjunction with the satellite space segment capacity;

c. acquire and operate connecting circuits between the earth station and IAN's Seattle operating center;

d. acquire, install and operate DCMS equipment for use with the authorized facilities; and

e. use facilities in a, b, c and d above to provide IAN's regularly authorized services, including private line, switched voice, facsimile and data services, between the U.S. and the Philippines.

3. IT IS FURTHER ORDERED that our authorization of IAN to provide private lines as part of its authorized services is limited to the provision of such private lines only between the United States and the Philippines -- that is, private lines which originate in the United States and terminate in the Philippines or which originate in the Philippines and terminate in the United States. In addition, IAN may not -- and IAN's tariff must state that IAN's customers may not -- connect private lines provided over these facilities to the public switched network at either the U.S. or the Philippines end, or both, for the provision of international basic telecommunications services, including switched voice services, unless authorized to do so by the Commission upon a finding that the Philippines affords resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates, Phase II, First Report and Order*, 7 FCC Rcd 559 (1991) *petitions for reconsideration pending*.

4. IT IS FURTHER ORDERED that neither IAN nor any persons or companies directly or indirectly controlling or controlled by IAN, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions, which is denied to any other United States carrier by reason of any concession, contract, understanding, or working arrangement to which IAN or any persons or companies controlling or controlled by IAN are parties.

5. IT IS FURTHER ORDERED that applicant shall file copies of any operating agreement it enters into with its foreign correspondent with the Commission within 30 days of their execution, and shall otherwise comply with the filing requirements contained in Section 43.51 of the Commission's Rules, 47 C.F.R. §43.51.

6. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to §203 of the Communications Act, 47 U.S.C. §203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the service authorized in this Order.

7. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

8. IT IS FURTHER ORDERED that the applicant shall file semi-annual circuit reports pursuant to Section 63.15(b) of the Commission's Rules, 47 C.F.R. §63.15(b).

9. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to ensure nondiscriminatory use of, and equitable access to, the communications satellite system.

10. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

SPRINT COMMUNICATIONS COMPANY L.P. File No. I-T-C-94-238

Application for authority to lease and operate facilities for the provision of direct packet data service between the United States and Cuba

ORDER AND AUTHORIZATION

Adopted: June 10, 1994; Released: June 22, 1994

By the Chief, International Facilities Division:

1. The Commission has under consideration the above-captioned application filed by Sprint Communications Company L.P. ("Sprint") requesting authority pursuant to Section 214 of the Communications Act of 1934, as amended, to establish channels of communication between the United States and Cuba for the provision of direct packet data service. The application was placed on the Commission's public notice and no comments were received.

2. Sprint proposes to provide international packet data service between the U.S. and Cuba via the INTELSAT satellite located at 335° E.L. using appropriately licensed existing earth station facilities. Specifically, Sprint requests authority to lease from Comsat and operate one 2-Mbps digital satellite circuit between the Orion international Standard A earth station located at Shenandoah, Virginia and the theoretical midpoint of the INTELSAT AOR satellite connecting with matching facilities provided by INTERTEL S.A. ("INTERTEL") of Cuba. Sprint proposes to connect its operating center in New York, New York, to the Orion earth station using Sprint's own facilities. Sprint states that it has already entered into an operating agreement with INTERTEL for the establishment of direct packet data service between the United States and Cuba. Under the terms of its agreement, INTERTEL and Sprint have agreed to a 50/50 split of a $5.50 per kilosegment and $5.50 per hour accounting rate for packet data traffic. Sprint states this rate is consistent with U.S. policy guidelines.[1] Sprint states that it will initiate service within one year.

3. Sprint states that the public interest would be served by a grant of its application because it will result in the rapid introduction of new lines of telecommunications between the United States and Cuba. Sprint states that an immediate and large demand exists for direct telecommunications services between the United States and Cuba, and Sprint's proposed service will help meet that demand within the regulatory framework established by the Cuban Democracy Act.

4. In a letter dated July 22, 1993, the U.S. Department of State informed the Commission of the Executive Branch's general policy guidelines for implementation of the telecommunications provisions of the Cuban Democracy Act, which provides that "telecommunication services between the United States and Cuba shall be permitted."[2] Among the policy guidelines are the following requirements: 1) the proposals must have the potential to be operational within a year; 2) settlements must not be more favorable to Cuba than the current 50/50 split of the $1.20 per minute accounting rate; 3) proposals must be limited to equipment and services necessary to deliver a signal to Cuba; 4) proposals must utilize modes of communications already in place between the U.S. and Cuba; and 5) carriers shall report the number of circuits activated by facility on June 30 and December 31 of each year and on the one-year anniversary of the notification by the FCC in the Federal Register.

5. Upon consideration of Sprint's application, we find that a grant of its application will serve the public interest subject to the conditions set forth below. Sprint's application is consistent with the Executive Branch's general guidelines set forth in the Department of State's letter. Sprint states that it will initiate service within one year, and expects to initiate service shortly after all requisite regulatory approvals have been obtained. Sprint's proposed use of INTELSAT facilities and appropriately licensed existing earth station facilities satisfies the requirements that facilities already be in existence and be limited to equipment and services necessary to deliver a signal to Cuba.

6. With respect to Sprint's proposed 50/50 split of a $5.50 per kilosegment and $5.50 per hour accounting rate for packet data traffic between the United States and Cuba, the Department of State in a follow-up letter dated May 23, 1994, stated it has no objection to our approval so long as we determine that this proposed rate does not exceed the 50/50 split of the $1.20 accounting rate required under the guidelines.[3] We find that the proposed accounting rate is within the Department of State's guidelines because both the approximately 27.5¢ per minute accounting rate for a typical dial packet data transmission, and the approximate-

[1] Sprint explains that packet data traffic is measured based on a unit known as a "kilosegment." Sprint states that on a typical dial packet data transmission, two kilosegments are transferred per hour. On a typical dedicated packet data transmission, four kilosegments are transferred per hour. Therefore, for a typical dial packet data transmission, the total accounting rate would be approximately $16.50 per hour (27.5¢ per minute), including $5.50 for the hour of time and $11.00 for the two kilosegments of transmitted packet data. For a typical dedicated packet data transmission, the total accounting rate would be approximately $27.50 per hour (46¢ per minute), including $5.50 for the hour of time and $22.00 for the four kilosegments of transmitted packet data.

[2] Letter dated July 22, 1993, from Richard C. Beaird, Acting U.S. Coordinator and Director, Bureau of International Communications and Information Policy, U.S. Department of State to FCC Chairman James H. Quello.

[3] Letter dated May 23, 1994, from Richard C. Beaird, Senior Deputy U.S. Coordinator, Bureau of International Communications and Information Policy, U.S. Department of State, to FCC Chairman Reed Hundt.

ly 46¢ per minute accounting rate for a typical dedicated packet data transmission[4] is well below the $1.20 per minute accounting rate approved for voice services.

7. Accordingly, IT IS ORDERED that application File No. I-T-C-94-238 IS GRANTED and Sprint Communications Company, L.P. is authorized to:

a. lease from Comsat and operate one 2-Mbps digital satellite circuit between the Orion international Standard A earth station located at Shenandoah, Virginia and the INTELSAT AOR satellite located at 335° E.L. connecting with matching facilities furnished by Sprint's correspondent in Cuba, INTERTEL S.A. (the international division of EMTELCUBA);

b. lease from Orion and operate necessary earth segment facilities at Orion's earth station at Shenandoah, Virginia;

c. operate necessary connecting facilities between its operating center in New York and Orion's earth station at Shenandoah, Virginia; and

d. use the above facilities for the provision of direct packet data service between the U.S. and Cuba subject to the conditions set forth herein.

8. IT IS FURTHER ORDERED that the service authorized herein must be implemented within one year from the date of release of this order.

9. IT IS FURTHER ORDERED that Sprint and INTERTEL shall split 50/50 the $5.50 per hour and $5.50 per kilosegment accounting rate for this service.

10. IT IS FURTHER ORDERED that the applicant shall submit reports on or before June 30, and December 31 of each year, and on the one-year anniversary of the notification of the grant of the this application in the Federal Register indicating the numbers of circuits activated by facility.

11. IT IS FURTHER ORDERED that this authorization is subject to the applicant's obtaining all necessary licenses and authorizations from the Departments of Treasury and Commerce.

12. IT IS FURTHER ORDERED that this order is subject to revocation without a hearing in the event the Department of State or the Federal Communications Commission determines that the continuation of communications between the U.S. and Cuba is no longer in the national interest.

13. IT IS FURTHER ORDERED that, pursuant to Section 203 of the Communications Act, 47 U.S.C. § 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, Sprint shall file and have in effect a tariff for the service authorized in this order before offering services to the public.

14. IT IS FURTHER ORDERED that Sprint shall file copies of any operating agreements entered into by itself or its parent/affiliates with its correspondents within 30 days of their execution, and shall otherwise comply with the filing requirements contained in Section 43.51 of the Commission's Rules, 47 C.F.R. § 43.51.

15. IT IS FURTHER ORDERED that Sprint shall file annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. § 43.61.

16. IT IS FURTHER ORDERED that Sprint shall file a Section 214 application for any additional circuits it proposes to establish between the U.S. and Cuba.

17. Acceptance of this authorization shall be deemed acceptance of the conditions set forth herein.

18. This authorization is issued pursuant to Section 0.291 of the Commission's Rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

[4] *See supra* note 1.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

American Telephone and Telegraph Company — File No. I-T-C-94-093

Application for Authorization under Section 214 of the Communications Act of 1934, as amended, to Acquire and Operate Capacity in the Hong Kong-Taiwan 2 Cable System for the Provision of its Authorized Services between Points in or Reached via the United States, Hong Kong and Taiwan

ORDER AND AUTHORIZATION

Adopted: June 10, 1994; Released: June 22, 1994

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed by American Telephone and Telegraph Company ("AT&T") pursuant to Section 214 of the Communications Act of 1934, as amended, we find that the present and future public convenience and necessity require the acquisition and operation of capacity in the Hong Kong-Taiwan 2 Cable System ("HONTAI-2")[1] for the provision of AT&T's authorized services between points in or reached via the United States, Hong Kong and Taiwan by AT&T.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-94-093 IS GRANTED and AT&T[2] is authorized to:

a. acquire, on an Indefeasible Right of User ("IRU") basis,[3] and operate half-interests in 180 MAUOs[4] of capacity in the Hong Kong-Taiwan 2 Cable System ("HONTAI 2");

b. acquire by lease or other comparable means such extension facilities as may be needed to extend the capacity to be acquired in HONTAI 2; and

c. activate capacity in the HONTAI-2 Cable System and in the aforementioned extension facilities for the provision of its authorized services between the United States, Hong Kong and Taiwan.

3. This Order is issued pursuant to Section 0.291 of the Commission's rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section of 1.115 of the Commission's rules may be filed within 30 days of public notice of this Order. (*See* 47 C.F.R. § 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Appendix A

Countries AT&T is Authorized to Serve Via the HONTAI-2 Cable System

Singapore
China
Taiwan
Hong Kong
Indonesia
Malaysia
Vietnam
Thailand

[1] The HONTAI-2 Cable System extends between landing points at cable stations at Cape D Aguilar, Hong Kong and Fangshan, Taiwan. The HONTAI-2 Cable System is divided into three segments: Segment A consists of the cable station at Cape D Aguilar, Hong Kong; Segment B consists of submarine cable between Cape D Aguilar and Fangshan, Taiwan; and Segment C consists of the cable station at Fangshan. The HONTAI-2 Cable System will be extended by suitable facilities to the borders of other countries, including the United States, or to the terminals of other international communications systems. This will enable the HONTAI-2 Cable System to be used for services between the United States, Hong Kong and Taiwan.

[2] AT&T's wholly-owned subsidiary, Transoceanic Communications, Inc., will own the IRU interests in the HONTAI-2 Cable System on AT&T's behalf.

[3] AT&T will be using the acquired facilities in the HONTAI-2 Cable System for the exchange of jointly provided services between the United States with its correspondents in Hong Kong, Taiwan and the countries identified in Appendix A. Specifically, the HONTAI-2 acquisition is an extension of an overall network of authorized facilities that have previously been acquired on an IRU or ownership basis. The acquisition of capacity in HONTAI-2 will extend and connect AT&T's existing authorized facilities by providing an alternate route to permit connectivity to countries that AT&T is currently authorized to serve.

[4] A MAUO is defined as a 64-kilobit per second circuit equivalent. AT&T will pay an estimated unit cost of $9,800 per half-interest in each MAUO, plus an estimated $2,200 per half-interest in each MAUO for Segment A Cable Station costs.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

American Telephone and Telegraph Co.

File No. I-T-C-94-233

Application for Authorization, Pursuant to Section 214 of the Communications Act, As Amended, and the TAT-9 Section 214 to Modify its Ownership of Capacity in the TAT-9 Cable System

ORDER AND AUTHORIZATION

Adopted: June 8, 1994; **Released: June 22, 1994**

By the Chief, International Facilities Division:

1. American Telephone and Telegraph Co. (AT&T) filed the above-captioned application, pursuant to Section 214 of the Communications Act of 1934, as amended, and the TAT-9 Section 214 Authorization, to modify its ownership capacity in the TAT-9 Cable System.[1] We placed the application on public notice on March 30, 1994, and received no comments.

2. Specifically, AT&T seeks approval to modify its ownership capacity in the TAT-9 Cable System as reflected in the 6th Supplementary Agreement to the TAT-9 Construction and Maintenance Agreement and Addendum (Agreement), filed as Attachments B and C to the application, in order to accommodate the revised requirements of the TAT-9 Cable System owners. In the original TAT-9 authorization, AT&T was authorized to own and operate 8450 jointly-owned MAUOs.[2] AT&T now seeks authority to own and operate 7293 jointly-owned MAUOs and 255 wholly-owned MAUOs.[3] We find that the present and future public convenience and necessity require grant of this application.

3. Accordingly, IT IS ORDERED that Application File No. I-T-C-94-233 IS GRANTED and AT&T is authorized to modify its ownership of capacity and acquire the additional number of circuits in the TAT-9 Cable System, as described in paragraph 2, *supra*.

4. This Order is issued pursuant to Section 0.291 of the Commission's rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's rules may be filed within 30 days of the public notice of this Order. (*See* Section 1.4(b)(2) of the Commission's rules, 47 C.F.R. §1.4(b)(2).)

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

---

[1] *AT&T*, 4 FCC Rcd 1129, 1133 (1988). The TAT-9 Cable System extends between landing points at cable stations at Manahawkin, New Jersey; Pennant Point, Nova Scotia; Goonhilly, United Kingdom; St. Hillare, France; and Conil, Spain.

[2] A MAUO is a 64-kilobit per second circuit equivalent.

[3] *See* Appendixes A and B.

APPENDIX A

SCHEDULE E-1
24 June 1992

ASSIGNMENT OF CAPACITY IN SUBSEGMENT F1 IN HALF INTERESTS IN 73,684.656 BITS PER SECOND CHANNELS

PARTIES	APTT	BTT	TD	SFPT	FT	DBPT	DTE	DTT	ITC	LPT	MPTT	NT	CPBB	TLFN	STA	SPTT	TPTT	BT	MCL	VPTT	OTC	TLCB	NDD	ADMN	OTHE	OTHR	TOTAL
																						#	*	*			
APTT	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	12	-	-	-	-	12
BTT	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	48	-	-	-	-	48
TD	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	18	-	-	-	-	18
SFPT	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	6	-	-	-	-	6
FT	-	-	-	-	4	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	167	28	-	-	-	201
DBPT	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	120	-	-	-	-	120
DTE	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	30	-	-	-	-	30
DTT	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	30	-	-	-	-	30
ITC	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	30	150	-	-	-	-	180
LPT	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	18	-	-	-	-	18
MPTT	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	48	30	-	-	-	78
NT	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	12	-	-	-	-	12
CPBB	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	30	-	-	-	-	30
TLFN	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	120	30	-	-	-	150
STA	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	24	-	-	-	-	24
SPTT	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	48	-	-	-	-	48
TPTT	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	30	-	-	-	-	30
BT	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	174	-	-	300	300	-	-	-	-	934
MCL	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	90	-	-	-	-	90
VPTT	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	30	-	-	-	-	30
OTC	-	-	-	-	-	-	-	-	30	-	-	-	-	-	-	-	-	390	-	-	-	-	-	-	-	-	420
TLCB	12	48	18	6	167	120	30	30	150	18	78	12	30	120	24	48	30	390	90	30	-	300	-	-	-	-	1 905
NDD	-	-	-	-	30	-	-	-	-	-	30	-	-	30	-	-	-	-	-	-	-	-	-	-	-	-	90
ADMN #	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	0
OTHE *	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	0
OTHR *	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	0
TOTAL	12	48	18	6	201	120	30	30	180	18	78	12	30	150	24	48	30	934	90	30	420	1905	90	0	0	0	4 500

ADMIN CAPACITY PROPORTIONS PERCENT(Note 2)

ATT	0 00000%	BT	37 69333%	DCTT	0 76933%	TLFN	0 00000%	TLCB	71 53846%	TOTAL	100 00000%

* - Note 1 # - Note 3

APPENDIX B

OWNERSHIP INTERESTS OF SEGMENT F
OF THE TAT-9 CABLE SYSTEM

PARTIES	PERCENT
APTT	0.37651
RTT	1.08103
TD	0.48701
SFPT	0.12159
FT	6.62776
DBPT	4.23416
OTE	0.30429
BTE	0.94610
ASST	4.11761
ITC	3.47723
LPT	0.29527
NPTT	1.34039
NT	0.22898
CPRM	0.31202
TLFN	6.14853
STA	0.71495
SPTT	1.48104
TPTT	0.84546
BT	18.79108
MCL	1.96444
YPTT	0.31829
OTC	2.36898
JTB	0.04577
TLGB	6.66209
KDD	1.47309
IDC	0.07227
ITJ	0.23530
KT	0.16303
TLMX	0.26611
TNZI	0.24217
PLDT	0.21746
STEL	0.16303
ITDC	0.18140
ATT	22.31614
CIC1	0.58473
WCOM	0.70017
MCII	5.52907
TRT	2.19849
USSP	2.36696
TOTAL	100.00000

SCHEDULE E-2
24 June 1992

ASSIGNMENT OF CAPACITY IN SUBSEGMENT F2 IN HALF INTERESTS IN 73,684.656 BITS PER SECOND CHANNELS

PARTIES	APIT	BIT	ID	SIPT	FJ	DRPT	OIE	BTE	ITC	LPT	NPIT	NT	CPRN	TLFN	STA	SPIT	IPIT	BI	ACI	VPIT	OIC	JIN	RDD	IDC	LEJ	RT	TLNN	TNEI	PLDT	STEL	ITDC	ATT	CICI	WCDN	WCII	TBI	UBSP	ADMN	OTHE	OTHR	TOTAL
																																							#	*		
APIT	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	11	-	-	-	-	-	2	-	2	-	2	61	-	-	30	-	-	-	-	-	100
BIT	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	30	-	30	-	-	-	-	-	-	-	-	150	7	30	60	11	30	-	-	-	348
ID	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	17	-	-	-	-	-	-	-	-	-	-	90	-	-	22	2	-	-	-	-	141
SIPT	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	7	-	-	-	-	-	-	-	-	-	-	30	-	-	3	3	-	-	-	-	39
FJ	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	30	-	60	-	30	30	30	30	-	30	-	1002	30	30	240	120	120	-	-	-	1 650
DRPT	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	60	6	60	-	-	-	15	-	12	-	-	780	20	30	210	105	90	-	-	-	1 386
OIE	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	30	-	-	-	-	30
BTE	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	30	-	-	-	-	-	-	10	-	-	-	100	3	-	30	-	30	-	-	-	203
ITC	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	30	-	60	-	-	-	-	-	10	-	20	490	-	-	60	-	30	-	-	-	690
LPT	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	30	-	-	30	-	30	-	-	-	90
NPIT	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	30	-	30	-	30	-	-	-	-	-	-	180	10	30	60	14	30	-	-	-	404
NT	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	9	-	-	-	-	-	-	-	-	-	-	60	1	-	1	2	-	-	-	-	73
CPRN	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	30	-	3	30	-	-	-	-	-	63
TLFN	-	-	-	-	-	-	-	-	-	-	-	-	-	30	-	-	-	-	-	-	30	-	30	-	-	-	30	2	30	-	10	540	20	30	60	8	90	-	-	-	900
STA	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	27	-	30	-	-	-	-	-	-	-	-	90	2	-	60	3	30	-	-	-	250
SPIT	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	20	-	-	-	-	-	-	-	-	-	-	5	-	1	-	-	240	10	30	120	30	-	-	-	-	460
IPIT	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	120	-	-	30	-	-	-	-	-	150
BI	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	160	-	-	-	15	90	30	30	30	10	60	12	30	30	2880	60	90	630	360	300	-	-	-	4 907
ACI	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	210	30	-	90	210	90	-	-	-	630
VPIT	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	60	-	-	-	-	-	-	-	-	60
OIC	11	30	17	7	30	60	-	30	30	-	30	9	-	30	27	-	-	-	15	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	311
JIN	-	-	-	-	-	6	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	15
RDD	-	30	-	-	60	60	-	-	60	-	30	-	-	30	30	-	-	-	90	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	300
IDC	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	30	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	30
LEJ	-	-	-	-	30	-	-	-	-	-	30	-	-	-	-	-	-	-	30	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	90
RT	-	-	-	-	30	-	-	-	-	-	-	-	-	-	-	-	-	-	30	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	60
TLNN	2	-	-	-	20	15	-	-	-	-	-	-	-	30	-	5	-	-	10	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	90
TNEI	-	-	-	-	30	-	-	10	-	-	-	-	-	2	-	-	-	-	60	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	92
PLDT	2	-	-	-	-	12	-	-	10	-	-	-	-	20	-	1	-	-	12	-	-	-	-	-	-	-	-	-	14	-	-	-	-	-	-	-	-	-	-	-	-	71
STEL	-	-	-	-	30	-	-	-	-	-	-	-	-	10	-	-	-	-	30	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	60
ITDC	3	-	-	-	-	-	-	-	20	-	-	-	-	10	-	-	-	-	30	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	63
ATT	61	150	90	30	1002	780	-	100	480	30	180	60	30	540	90	240	120	2880	210	60	-	-	-	-	-	-	-	-	-	-	-	510	-	-	-	-	-	-	-	-	7 683
CICI	-	7	-	-	30	30	-	2	-	-	10	1	-	20	2	10	-	60	30	-	-	-	-	-	-	-	-	-	-	-	-	-	30	-	-	-	-	-	-	-	-	210
WCDN	-	30	-	-	30	30	-	-	-	-	30	-	2	30	-	30	-	90	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	262
WCII	30	60	32	-	240	210	30	30	60	30	60	1	30	60	60	120	30	810	90	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	120	-	-	-	-	2 111
TBI	-	11	2	2	120	105	-	-	-	-	11	2	-	8	3	30	-	360	210	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	867
UBSP	-	30	-	-	120	90	-	30	30	30	30	-	-	90	30	-	-	360	90	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	870
ADMN	#	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	0
OTHE	*	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	0
OTHR	*	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	0
TOTAL	108	348	141	39	1850	1365	30	282	690	90	404	73	62	900	250	460	150	4907	630	60	311	15	390	30	90	60	90	92	71	60	62	7683	210	262	2111	867	870	0	0	0	26 364

ADMIN CAPACITY PROPORTIONS PERCENT(Note 2)

ATT	73 639035%	BT	15 483875%	DCTF	0 983875%	TLFN	3 903225%	TLCN	0 000000%	TOTAL	100 000000%
---	---	---	---	---	---	---	---	---	---	---	---

* - Note 1 # - Note 3

SCHEDULE E-3
24 June 1992

ASSIGNMENT OF CAPACITY IN SUBSEGMENT F3 IN HALF INTERESTS IN 73,684.656 BITS PER SECOND CHANNELS

PARTIES	APTT	BTT	HD	SIP3	FF	IMP3	OIC	RTT	TTC	LPT	MPTT	MI	CPRM	TLFN	STA	SPTT	IPTT	BT	MCL	VPTT	OIC	JTB	TLCB	KDD	IDC	ITJ	RT	TLRM	INFI	PLDT	STEL	ITDC	ATT	CICI	WCBM	MCII	INT	USSP	ADMN	OTHR	OTHR	TOTAL
APTT	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	11	-	12	-	-	-	-	2	-	2	-	2	61	-	-	30	-	-	-	-	-	130
BTT	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	30	-	40	30	-	-	-	-	-	-	-	-	150	7	30	60	11	30	-	-	-	380
HD	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	17	-	10	-	-	-	-	-	-	-	-	-	90	-	-	22	3	-	-	-	-	190
SIP3	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	7	-	6	-	-	-	-	-	-	-	-	-	30	-	-	-	3	-	-	-	-	45
FF	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	30	-	107	90	-	30	30	30	20	-	30	-	1002	30	30	240	130	130	-	-	-	2 047
IMP3	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	88	4	120	60	-	-	-	15	-	12	-	-	700	30	30	210	105	90	-	-	-	1 506
OIC	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	30	-	-	-	-	-	-	-	-	-	-	-	-	30	-	-	-	-	-	60
RTE	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	30	-	30	-	-	-	-	-	18	-	-	-	180	3	-	30	-	30	-	-	-	313
TTC	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	60	-	150	60	-	-	-	-	-	10	-	30	480	-	-	60	-	30	-	-	-	870
LPT	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	10	-	-	-	-	-	-	-	-	-	30	-	-	30	-	30	-	-	-	100
MPTT	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	30	-	40	60	-	30	-	-	-	-	-	-	100	10	20	60	11	30	-	-	-	471
MI	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	9	-	12	-	-	-	-	-	-	-	-	-	90	1	-	1	2	-	-	-	-	85
CPRM	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	10	-	-	-	-	-	-	-	-	-	30	-	2	30	-	-	-	-	-	92
TLFN	-	-	-	-	-	-	-	-	-	-	-	-	-	38	-	-	-	-	-	-	30	-	120	60	-	-	-	30	2	20	-	10	540	30	30	60	8	90	-	-	-	1 050
STA	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	27	-	20	30	-	-	-	-	-	-	-	-	90	2	-	60	3	30	-	-	-	274
SPTT	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	34	-	-	-	-	-	-	40	-	-	-	-	5	-	3	-	-	340	10	30	120	30	-	-	-	-	708
IPTT	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	30	-	-	-	-	-	-	-	-	-	120	-	-	30	-	-	-	-	-	180
BT	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	180	-	-	390	15	390	90	30	30	30	10	60	12	30	30	2000	60	90	810	360	300	-	-	-	5 777
MCL	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	90	-	-	-	-	-	-	-	-	-	210	30	-	90	210	90	-	-	-	720
VPTT	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	30	-	-	-	-	-	-	-	-	-	-	-	60	-	-	-	-	-	-	-	-	90
OIC	11	30	17	7	30	60	-	30	60	-	30	9	-	30	11	-	-	190	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	731
JTB	-	-	-	-	-	4	-	-	-	-	-	-	-	-	-	-	-	15	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	19
TLCB	12	40	10	6	167	120	30	30	150	10	40	12	30	120	24	46	30	390	90	30	-	-	62	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	1 459
KDD	-	30	-	-	90	60	-	-	60	-	60	-	-	60	30	-	-	90	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	480
IDC	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	30	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	30
ITJ	-	-	-	-	30	-	-	-	-	-	30	-	-	-	-	-	-	30	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	90
RT	-	-	-	-	30	-	-	-	-	-	-	-	-	-	-	-	-	30	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	60
TLRM	3	-	-	-	30	15	-	-	-	-	-	-	-	30	-	9	-	18	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	90
INFI	-	9	-	-	30	-	-	10	-	-	-	-	-	3	-	-	-	60	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	92
PLDT	3	-	-	-	-	12	-	-	10	-	-	-	-	20	-	1	-	12	-	-	-	-	-	-	-	-	-	-	-	-	16	-	-	-	-	-	-	-	-	-	-	-	71
STEL	-	-	-	-	30	-	-	-	-	-	-	-	-	-	-	-	-	30	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	60
ITDC	2	-	-	-	-	-	-	-	20	-	-	-	-	10	-	-	-	30	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	62
ATT	61	190	90	30	1863	780	-	180	480	30	180	60	30	540	90	240	120	2880	210	60	-	-	-	-	-	-	-	-	-	-	-	-	510	-	-	-	-	-	-	-	-	7 883
CICI	-	7	-	-	30	30	-	3	-	-	10	1	-	20	3	10	-	60	30	-	-	-	-	-	-	-	-	-	-	-	-	-	-	30	-	-	-	-	-	-	-	210
WCBM	-	30	-	-	30	30	-	-	-	-	30	-	3	30	-	30	-	90	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	363
MCII	30	60	33	-	240	210	30	30	60	30	60	1	30	60	60	120	30	810	90	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	120	-	-	-	-	2 111
INT	-	11	3	2	130	105	-	-	-	-	14	2	-	8	3	30	-	360	210	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	867
USSP	-	30	-	-	130	90	-	30	30	30	30	-	-	90	26	-	-	300	90	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	870
ADMN	0	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	0
OTHR	*	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	0
OTHR	*	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	0
TOTAL	120	380	150	45	2847	1506	60	312	870	100	474	85	93	1058	274	588	180	5772	720	90	711	19	1059	480	30	90	60	90	93	71	60	62	7883	218	363	2111	867	870	0	0	0	30	368

ADMIN CAPACITY PROPORTIONS PERCENT(Note 2)

ATT	60 04000%	BT	17 60000%	LGTF	7 56000%	TLFN	3 40000%	TLCB	12 40000%	TOTAL	100 00000%	

SCHEDULE E-4
24 June 1992

ASSIGNMENT OF CAPACITY IN SUBSEGMENT F4 IN HALF INTERESTS IN 73,684.656 BITS PER SECOND CHANNELS

Parties	ATT	TD	SFPT	DBPT	OTC	BTE	ASST	LPT	MPTT	MT	TLFN	STA	SPTT	TPTT	BT	MCI	OTC	JTB	TLCB	KDD	IDC	ITJ	AT	TLWA	TNPI	PLDT	STEL	ITDC	ATT	CICI	WCOM	MCII	TRT	USSP	ADMN	OTHI	OTHO	TOTAL
ATT	-	-	-	-	-	-	-	-	-	-	30	-	-	-	-	-	30	-	60	30	-	-	-	-	-	-	-	-	90	7	30	60	10	30	-	-	-	350
TD	-	-	-	-	-	-	30	-	-	-	9	-	-	-	-	-	17	-	10	-	-	-	-	-	-	-	-	-	90	-	-	33	3	-	-	-	-	196
SFPT	-	-	-	-	-	-	-	-	-	-	3	-	-	-	-	-	7	-	6	-	-	-	-	-	-	-	-	-	36	-	-	-	2	-	-	-	-	40
DBPT	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	30	6	60	30	-	-	-	15	-	12	-	-	300	20	30	120	60	-	-	-	-	721
OTC	-	-	-	-	-	-	-	-	-	-	-	-	-	-	30	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	30
BTE	-	-	-	-	-	12	30	-	-	-	30	-	-	-	-	-	30	-	30	-	-	-	-	-	-	-	-	-	108	2	-	30	-	30	-	-	-	370
ASST	-	30	-	-	-	30	-	-	-	-	-	-	-	-	600	60	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	720
LPT	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	30	-	-	-	-	-	30
MPTT	-	-	-	-	-	-	-	-	-	-	30	-	-	-	-	-	30	-	60	30	-	30	-	-	-	-	-	-	120	10	20	60	10	30	-	-	-	410
MT	-	-	-	-	-	-	-	-	-	-	9	-	-	-	-	-	9	-	12	-	-	-	-	-	-	-	-	-	60	1	-	6	2	-	-	-	-	90
TLFN	30	9	3	-	-	30	-	-	30	9	-	12	-	-	900	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	1 050
STA	-	-	-	-	-	-	-	-	-	-	12	-	-	-	-	-	27	-	24	30	-	-	-	-	-	-	-	-	90	2	-	66	3	30	-	-	-	267
SPTT	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	12	-	-	-	-	3	-	1	-	-	30	10	-	90	30	-	-	-	-	176
TPTT	-	-	-	-	-	-	-	-	-	-	-	-	-	-	90	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	90
BT	-	-	-	-	30	-	600	-	-	-	900	-	-	90	900	-	240	15	390	90	30	30	30	30	60	12	30	30	2000	60	90	810	360	300	-	-	-	7 457
MCI	-	-	-	-	-	-	60	-	-	-	-	-	-	-	-	-	-	-	90	-	-	-	-	-	-	-	-	-	330	30	-	90	210	90	-	-	-	760
OTC	30	17	9	30	-	30	-	-	30	9	-	27	-	-	390	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	570
JTB	-	-	-	6	-	-	-	-	-	-	-	-	-	-	15	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	19
TLCB	60	18	6	60	-	30	-	-	60	12	-	24	12	-	390	90	-	-	2	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	724
KDD	30	-	-	30	-	-	-	-	30	-	-	30	-	-	90	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	210
IDC	-	-	-	-	-	-	-	-	-	-	-	-	-	-	30	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	30
ITJ	-	-	-	-	-	-	-	-	30	-	-	-	-	-	30	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	60
AT	-	-	-	-	-	-	-	-	-	-	-	-	-	-	30	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	30
TLWA	-	-	-	15	-	-	-	-	-	-	-	-	3	-	10	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	30
TNPI	-	-	-	-	-	-	-	-	-	-	-	-	-	-	60	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	60
PLDT	-	-	-	12	-	-	-	-	-	-	-	-	1	-	12	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	25
STEL	-	-	-	-	-	-	-	-	-	-	-	-	-	-	30	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	30
ITDC	-	-	-	-	-	-	-	-	-	-	-	-	-	-	30	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	30
ATT	90	18	30	360	-	180	-	-	120	60	-	90	30	-	2400	210	-	-	-	-	-	-	-	-	-	-	-	-	330	-	-	-	-	-	-	-	-	4 440
CICI	7	-	-	30	-	2	-	-	10	1	-	3	10	-	60	30	-	-	-	-	-	-	-	-	-	-	-	-	-	6	-	-	-	-	-	-	-	148
WCOM	30	-	-	30	-	-	-	-	20	-	-	-	-	-	90	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	170
MCII	60	33	-	120	-	30	-	30	60	1	-	66	90	-	810	90	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	120	-	-	-	-	1 511
TRT	11	2	3	60	-	-	-	-	14	2	-	3	30	-	360	210	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	696
USSP	30	-	-	-	-	30	-	-	30	-	-	30	-	-	300	90	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	510
ADMN	#	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	0
OTHI	*	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	0
OTHO	*	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	0
TOTAL	350	196	48	741	30	374	720	30	414	90	1080	207	178	90	7457	780	570	19	724	210	30	60	30	30	60	25	30	30	4440	160	170	1511	690	510	0	0	0 22	166

ADMIN CAPACITY PROPORTIONS PERCENT(Note 2)

ATT	41 65202%	BT	50 74693%	OCTF	0 00000%	TLFN	1 66960%	TLCB	5 93146%	TOTAL	100 00000%

* - Note 1 # - Note 3

SCHEDULE E-5
24 June 1992

ASSIGNMENT OF CAPACITY IN SUBSEGMENT F5 IN HALF INTERESTS IN 73,684.656 BITS PER SECOND CHANNELS

PARTIES	APTT	BTT	FT	ORPT	BTE	LPT	MPTT	CPRN	SPTT	VPTT	OTC	TLCB	KDDI	ITJ	BT	TLNX	TNZI	PLDT	STEL	ITDC	ATT	CICI	MCDN	ACII	TBT	USSP	ADMN	OTHE	OTHP	TOTAL
																									#	*	*			
APTT	.	.	.	.	.	.	.	.	.	.	11	12	.	.	.	2	.	2	.	3	61	.	.	30	.	.	.	.	.	120
BTT	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	66	.	.	.	.	.	.	.	.	66
FT	.	.	176	.	.	.	.	.	.	.	30	167	90	30	30	26	30	.	30	.	1063	30	30	240	120	120	.	.	.	2 223
ORPT	.	.	.	.	.	.	.	.	.	.	30	60	30	.	.	.	.	.	.	.	420	.	.	90	45	90	.	.	.	765
BTE	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	10	.	.	.	.	.	.	.	.	.	.	.	.	10
LPT	.	.	.	.	.	.	.	.	.	.	.	10	.	.	.	.	.	.	.	.	30	.	.	.	.	30	.	.	.	70
MPTT	.	.	.	.	.	.	.	.	.	.	.	.	30	.	.	.	.	.	.	.	60	.	.	.	.	.	.	.	.	90
CPRN	.	.	.	.	.	.	.	.	.	.	.	30	.	.	.	.	.	.	.	.	30	.	2	30	.	.	.	.	.	92
SPTT	.	.	.	.	.	.	.	.	36	.	.	30	.	.	.	.	.	.	.	.	210	.	30	30	.	.	.	.	.	336
VPTT	.	.	.	.	.	.	.	.	.	.	.	30	.	.	.	.	.	.	.	.	30	.	.	.	.	.	.	.	.	60
OTC	11	.	30	30	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	71
TLCB	12	.	167	60	.	10	.	30	30	30	.	60	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	431
KDDI	.	.	90	30	.	.	30	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	150
ITJ	.	.	30	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	30
BT	.	.	30	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	30
TLNX	2	.	20	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	30
TNZI	.	.	20	.	10	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	30
PLDT	2	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	2
STEL	.	.	30	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	30
ITDC	2	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	2
ATT	61	66	1063	420	.	30	60	30	210	30	.	.	.	.	.	.	.	.	.	.	676	.	.	.	.	.	.	.	.	2 659
CICI	.	.	30	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	30
MCDN	.	.	30	.	.	.	.	2	30	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	62
ACII	30	.	240	90	.	.	.	30	30	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	420
TBT	.	.	120	45	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	165
USSP	.	.	120	90	.	30	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	240
ADMN #	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	0
OTHE *	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	0
OTHP *	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	0
TOTAL	120	66	2223	765	10	70	90	92	330	60	71	431	150	30	30	30	30	2	30	2	3659	30	62	420	165	240	0	0	0	0 207

ADMIN CAPACITY PROPORTIONS PERCENT(Note 2)

ATT	64 00000%	BT	0 00000%	DCTF	24 38710%	TLFM	0 00000%	TLCB	11 61290%	TOTAL	100 00000%

* - Note 1 # - Note 3

SCHEDULE E-6
24 June 1992

ASSIGNMENT OF CAPACITY IN SUBSEGMENT F6 IN HALF INTERESTS IN 73,684.656 BITS PER SECOND CHANNELS

PARTIES	BTT	TD	SPPT	OTE	BTE	ASST	ITC	MPTT	NT	TLFN	STA	TPTT	BT	MCL	VPTT	OTC	TLCB	RDD	TLAN	INEI	PLDT	ITDC	ATT	CICI	WCON	MCII	TBT	UBSP	ADMN	OTHE	OTHR	TOTAL
																											#	*	*			
BTT	-	-	-	-	-	-	-	-	-	30	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	30
TD	-	-	-	-	-	30	-	-	-	5	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	35
SPPT	-	-	-	-	-	-	-	-	-	3	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	3
OTE	-	-	-	-	-	-	-	-	-	-	-	-	30	-	-	-	30	-	-	-	-	-	-	-	-	30	-	-	-	-	-	90
BTE	-	-	-	-	12	30	-	-	-	30	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	72
ASST	-	30	-	-	30	1620	-	-	-	-	-	-	600	60	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	2 340
ITC	-	-	-	-	-	-	180	-	-	-	-	-	-	-	-	60	150	60	-	-	-	10	20	480	-	-	60	-	30	-	-	-	1 050
MPTT	-	-	-	-	-	-	-	-	-	30	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	30
NT	-	-	-	-	-	-	-	-	-	5	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	5
TLFN	30	5	3	-	30	-	-	30	5	54	15	-	960	-	-	30	170	60	30	2	20	10	540	30	30	60	6	90	-	-	-	2 154
STA	-	-	-	-	-	-	-	-	-	15	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	15
TPTT	-	-	-	-	-	-	-	-	-	-	-	-	90	-	-	-	30	-	-	-	-	-	120	-	-	30	-	-	-	-	-	-	270
BT	-	-	-	30	-	600	-	-	-	960	-	90	60	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	1 740
MCL	-	-	-	-	-	60	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	60
VPTT	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	30	-	-	-	-	-	-	-	-	-	30
OTC	-	-	-	-	-	-	60	-	-	30	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	90
TLCB	-	-	-	30	-	-	150	-	-	120	-	30	-	-	-	-	84	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	414
RDD	-	-	-	-	-	-	60	-	-	60	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	120
TLAN	-	-	-	-	-	-	-	-	-	30	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	30
INEI	-	-	-	-	-	-	-	-	-	2	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	2
PLDT	-	-	-	-	-	-	10	-	-	30	-	-	-	-	-	-	-	-	-	-	14	-	-	-	-	-	-	-	-	-	-	-	44
ITDC	-	-	-	-	-	-	20	-	-	10	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	30
ATT	-	-	-	-	-	-	480	-	-	540	-	120	-	-	30	-	-	-	-	-	-	-	-	210	-	-	-	-	-	-	-	-	1 420
CICI	-	-	-	-	-	-	-	-	-	20	-	-	-	-	-	-	-	-	-	-	-	-	-	-	20	-	-	-	-	-	-	-	40
WCON	-	-	-	-	-	-	-	-	-	30	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	30
MCII	-	-	-	30	-	-	60	-	-	60	-	30	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	180
TBT	-	-	-	-	-	-	-	-	-	6	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	6
UBSP	-	-	-	-	-	-	30	-	-	90	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	120
ADMN #	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	0
OTHE *	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	0
OTHR *	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	0
TOTAL	30	35	3	90	72	2340	1080	30	5	2154	15	270	1740	60	30	90	414	120	30	2	44	30	1470	60	30	180	6	120	0	0	0	10 460

ADMIN CAPACITY PROPORTIONS PERCENT(Note 2)

ATT	40 61706%	BT	35 93466%	DCTF	0 00000%	TLFN	9 29210%	TLCB	14 15608%	TOTAL	100 00000%

* - Note 1 # - Note 3

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 93-162

In the Matter of
Local Exchange Carriers' Rates,
Terms, and Conditions for
Expanded Interconnection for
Special Access

Bell Atlantic Transmittal No. 656
Telephone Companies
Revisions to Tariff F.C.C. No. 1

MEMORANDUM OPINION AND ORDER

Adopted: June 10, 1994; Released: June 17, 1994

By the Acting Chief, Tariff Division, Common Carrier Bureau:

1. On May 6, 1994, the Bell Atlantic Telephone Companies (Bell Atlantic) filed Transmittal No. 656 to revise its Tariff F.C.C. No. 1. Bell Atlantic proposes making its Oakland, Pennsylvania central office available for physical collocation. Virtual collocation is already available in this office. Description and Justification at 1. No petitions were filed against this tariff. Transmittal 656 is scheduled to take effect on June 20, 1994.

2. This transmittal raises the same issues regarding cost allocations, rate levels, rate structures, and terms and conditions of service as those identified in the *Expanded Interconnection Tariff Order*. Therefore, Transmittal No. 656 is suspended for one day, until June 21, 1994, and will be subject to the investigation initiated in the *Expanded Interconnection Tariff Order*.[1] These rates will also be subject to an accounting order to facilitate any refunds that may later prove necessary.

3. Accordingly, IT IS ORDERED that, pursuant to Section 204(a) of the Communications Act of 1934, 47 U.S.C. § 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, the revisions to Bell Atlantic Tariff F.C.C. No. 1, Transmittal No. 656, ARE SUSPENDED for one day and an investigation of the referenced tariff transmittal IS INSTITUTED.

4. IT IS FURTHER ORDERED that Bell Atlantic SHALL FILE tariff revisions within five business days of the release date of this order to reflect this suspension.

5. IT IS FURTHER ORDERED that, for these purposes, we waive Sections 61.56, 61.58 and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.56, 61.58, and 61.59. Bell Atlantic should cite the "DA" number of the instant Order as the authority for this filing.

6. IT IS FURTHER ORDERED that, pursuant to Section 204(a) of the Communications Act of 1934, 47 U.S.C. § 204(a), Bell Atlantic shall keep accurate account of all amounts received by reason of the rates that are the subject of this investigation.

FEDERAL COMMUNICATIONS COMMISSION

David A. Nall
Acting Chief, Tariff Division
Common Carrier Bureau

[1] Ameritech Operating Companies, *et. al*, CC Docket No. 93-162, 8 FCC Rcd 4589 (Com. Car. Bur. 1993) (*Expanded Interconnection Tariff Order*).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

Rainbow	File No. BMPCT-910625KP
Broadcasting	File No. BMPCT-910125KE
Company	File No. BTCCT-911129KT

For an Extension of Time to Construct

and

For an Assignment of its Construction Permit for Station WRBW(TV), Orlando, Florida

MEMORANDUM OPINION AND ORDER

Adopted: May 20, 1994; Released: May 23, 1994

By the Commission: Commissioner Barrett issuing a statement.

1. By this Order, we conclude that reinstatement of the construction permit and the call sign of Rainbow Broadcasting Company ("Rainbow") and grant of Rainbow's application for an extension of time within which to construct station WRBW(TV), Orlando, Florida, serve the public interest. We also conclude that grant of Rainbow's application for a *pro forma* assignment of its construction permit also serves the public interest.[1] In so doing, we deny a contingent application for review filed by Press Broadcasting Company, Inc., ("Press") on August 26, 1993, and dismiss an emergency petition for extraordinary relief filed by Press on December 10, 1993.[2]

I. BACKGROUND

2. On September 9, 1982, Rainbow filed its application for a new UHF television station in Orlando, Florida. In a comparative hearing, Rainbow received a substantial enhancement based on its minority ownership and integration proposal. The Review Board granted Rainbow a permit to construct in 1984, and the Commission affirmed the grant on review in 1985. Challenges were made to the Commission's minority preference policies, and thus Rainbow's grant did not become final until August 30, 1990, when the Supreme Court denied rehearing in the *Metro Broadcasting* case.[3] During the appeal process, Rainbow requested and received from the Mass Media Bureau several reinstatements and extensions of time in which to construct.

3. On July 3, 1990, one month before the appellate process ended, Rainbow requested a fourth extension of time to construct its facilities. Rainbow claimed that because of the intervening appellate process its grant was not final, and thus sought a "normal" construction period of 24 months, to begin after completion of the judicial review. Instead, the Video Services Division granted Rainbow only a six-month extension of time to construct, from July 31, 1990, to January 31, 1991.

4. Prior to the expiration of the fourth extension period, on January 25, 1991, Rainbow requested its fifth extension. In addition to reciting the lengthy appellate process, Rainbow stated further that its actual construction efforts had been delayed as a result of a dispute with the tower owner. However, Rainbow represented that it was ready, willing, and able to initiate and complete construction within two years, by December 31, 1992. The Video Services Division, however, granted Rainbow only another six-month extension, until August 5, 1991. After the grant of Rainbow's fifth extension, Press filed an "Informal Objection" and a "Petition for Reconsideration." Press contended that Rainbow had itself initiated the tower litigation, in which Rainbow sought a preliminary injunction to prevent Press from co-locating on Rainbow's specified tower, and that the tower dispute did not preclude Rainbow in any way from commencing construction. Press also alleged that Rainbow had made misrepresentations before the Commission, engaged in anti-competitive behavior that constituted an abuse of process, and lacked the requisite financing. Rainbow responded to Press's opposition, and both parties filed further related pleadings.

5. On June 21, 1991, shortly before expiration of the fifth construction period extension and while Press's petition for reconsideration was still pending, Rainbow filed its sixth application for an extension of time to construct. Rainbow again recited the litigious history surrounding its permit and stated that a district court had denied the preliminary injunction that Rainbow had sought in connection with the tower dispute.[4] Rainbow represented that it had since notified the tower owner of its intent to proceed with construction, and that it still anticipated completing construction by December 31, 1992. On November 27, 1991, Rainbow filed a supplement to its sixth extension application, notifying the Commission that it had completed construction of its transmitter building. Also on November 27, 1991, Rainbow filed a *pro forma* assignment application, for the purpose of restructuring its organization to admit non-voting, limited equity partners, which would thereby "reduce its reliance on debt" and enable it to complete construction and commence operations by December 31, 1992. Press filed "Informal Objections"

[1] As discussed in nn.10 & 34, *infra*, our decision is based on an independent review of the record in this proceeding and has been undertaken without participation by the Chief, Mass Media Bureau, or his staff, who are recused from this matter.

[2] By this action, we also dismiss as moot Press's emergency petition to vacate the Bureau's action, filed August 13, 1993, as well as Rainbow's "Request for Immediate Action" filed April 22, 1994.

[3] *See Metro Broadcasting, Inc.*, 99 FCC 2d 688 (Rev. Bd. 1984); *rev. denied*, FCC 85-558 (released October 18, 1985), *held in abeyance*, 2 FCC Rcd 1474 (1987), *reaff'd*, 3 FCC Rcd 866 (1988), *aff'd, Winter Park Communications, Inc. v. FCC*, 873 F.2d 347 (1989), *aff'd, Metro Broadcasting, Inc. v. FCC*, 110 S. Ct. 2997 (1990), *petition for rehearing denied*, 111 S. Ct. 15 (1990).

[4] The tower dispute has since been remanded to state court for disposition.

against Rainbow's sixth extension application and assignment application, and included a copy of the district court's order denying the preliminary injunction. Rainbow responded, and both parties filed further related pleadings.

6. In early 1993, the Video Services Division had not yet acted on Press's petition for reconsideration of Rainbow's fifth extension or on Rainbow's request for a sixth extension. On March 22, 1993, more than one and a half years after Rainbow's fifth extension had expired, the Video Services Division requested that Rainbow address what steps, if any, it had taken toward construction of its facilities since the November 27, 1991, filings. On April 12, 1993, Rainbow responded by stating that it had completed construction of its transmitter building at a cost of $60,000, that it had maintained its lease for tower space since 1986 at an approximate cost of $500,000, and that it had selected equipment. However, Rainbow asserted that its efforts to proceed with construction were stymied by the Division's failure to act on its sixth extension application and its assignment application. Again, Press filed oppositions, and Rainbow filed responsive pleadings.

7. On June 18, 1993, the Chief, Video Services Division, denied Rainbow's sixth extension application, which then had been pending for two years. The Division cancelled Rainbow's construction permit, deleted its call sign, and dismissed as moot its assignment application and Press's petition for reconsideration of the fifth extension. *Station WRBW(TV)* (Video Serv. Div. June 18, 1993). According to the Division, Rainbow had "held a valid permit for a total of 32 months since the grant became final" with the termination of the appellate process in August of 1990. The Division determined that Rainbow had failed to establish the showing required to obtain an extension under 47 C.F.R. §73.3534. Specifically, the Division determined that Rainbow had not shown that it had made substantial progress toward construction or that circumstances beyond its control prevented construction, either during the entire 32-month period since *Metro Broadcasting* was decided or, more importantly, during the six-month construction period authorized by the grant of the fifth extension. The Division found that the tower dispute was not over whether Rainbow could proceed with construction, but rather whether Rainbow's asserted claim of exclusivity for certain leased space prevented its competitor, Press, from co-locating on the same tower. As such, according to the Division, the decision not to proceed with construction reflected a business decision on Rainbow's part, a circumstance within its control. Since it denied Rainbow's extension request, the Division did not find it necessary to address Press's arguments regarding Rainbow's qualifications to be a Commission licensee. Rainbow filed a petition for reconsideration of the Division's decision, which Press opposed.

8. On July 30, 1993, the Chief, Mass Media Bureau, granted Rainbow's petition for reconsideration. The Bureau reinstated Rainbow's construction permit and call sign, granted its assignment application, and granted its extension application, providing Rainbow with an additional eight-month period in which to construct its facilities based on Rainbow's estimated 220-day construction schedule. *WRBW(TV)* (Mass Media Bur. July 30, 1993). The Bureau concluded that Rainbow should not have been held to the showing required under 47 C.F.R. §73.3534, which applies to extensions of time beyond the normal two-year construction period. At the time Rainbow requested it's sixth extension, the Bureau emphasized, only ten months had passed since *Metro Broadcasting* was decided. The Bureau granted an eight-month extension of time from July 30, 1993. The Bureau also denied Press's allegations regarding Rainbow's character and finances.

II. PLEADINGS

9. On August 13, 1993, Press filed an emergency petition to rescind the Bureau's grant of Rainbow's extension and *pro forma* assignment, asserting that the Bureau's action was impermissibly tainted as a result of *ex parte* communications that occurred between Rainbow's counsel and the Bureau Chief and members of his staff prior to the Bureau's action. *See* "Emergency Petition for Immediate Rescission, Setting Aside or Vacation of Action Taken Pursuant to Delegated Authority." Press stated, *inter alia*, that its petition for reconsideration of Rainbow's fifth extension constituted a formal opposition and rendered the proceeding restricted under section 1.1208 of the Commission's *ex parte* rules. *Id.* at 4. Indeed, Press attached a letter dated October 8, 1991, from the Commission's Managing Director, which had been served on Press and Rainbow, noting that the proceeding was classified as "restricted" under the Commission's *ex parte* rules and that *ex parte* contacts were prohibited. *Id.* at 5 & Attachment C. Press also urged the Chief, Mass Media Bureau, to recuse himself from further participation in the proceeding.[5] *Id.* at 8-9.

10. In response to Press's emergency petition, Rainbow did not deny that it had made an *ex parte* presentation, but argued that the *ex parte* presentation was permissible. *See* "Rainbow Opposition to Press Emergency Petition." Rainbow acknowledged the Managing Director's indication that *ex parte* contacts were prohibited in the proceeding, but argued that the proceeding was informally, not formally, opposed, and thus seemed to argue that the Managing Director had improperly classified the proceeding as restricted. *Id.* at 3. In support of its position, Rainbow cited the note to section 1.1204(a)(1)(i) and argued that the *ex parte* rules did not bar the applicant, but rather barred only Press as an informal objector, from communicating *ex parte* with the Commission staff. *Id.* at 4.

11. In reply, Press contended that Rainbow had misstated and misapplied the Commission's rules, which explicitly prohibit *ex parte* communications in adjudicatory proceedings that are "formally opposed." *See* "Reply of Press Broadcasting, Inc. to 'Rainbow Opposition to Press Emergency Petition.'" As it previously asserted, Press maintained, *inter alia*, that its its petition for reconsideration, as well as its informal objection, constituted a formal opposition, and as such the proceeding was restricted under the Commission's *ex parte* rules. *Id.* at 4-5.

12. In addition to filing the emergency petition, on August 26, 1993, Press filed a "Contingent Application for Review." Press argued that the Bureau erred in granting Rainbow's extension application. Contrary to the Bureau's finding that Rainbow had never had two years in which to construct, Press claimed that Rainbow had held a valid

[5] In August of 1993, the Mass Media Bureau and its staff voluntarily recused itself from further participation in this proceeding. Press was promptly advised of that recusal, although it has noted that the recusal was not "formally disclosed" until February or 1994. Petitioner's Reply to "Opposition to Petition for Mandamus" at 2 n.2 (Feb. 10, 1994).

permit for a total of eight years, including three years following the completion of the appellate process. *Id.* at 9. Press maintained that the Bureau's grant of Rainbow's extension application was inconsistent with the requirements of section 73.3534 and Commission precedent, citing *Community Service Telecasters, Inc.*, 6 FCC Rcd 6026 (1991); *Panavideo Broadcasting, Inc.*, 6 FCC Rcd 5259 (1991); *High Point Community Television, Inc.*, 2 FCC Rcd 2506 (1987); *Metrovision, Inc.*, 3 FCC Rcd 598 (Video Serv. Div. 1988). *See* "Contingent Application for Review" at 10-11. Accordingly, Press argued that Rainbow's extension application should have been denied because Rainbow failed to demonstrate that it had made any substantial progress in its construction efforts or that circumstances beyond its control prevented it from constructing. *Id.* at 12-13.

13. Press also claimed that the Bureau erred in granting Rainbow's extension and assignment applications without first conducting a full evidentiary hearing to determine Rainbow's basic qualifications to be a Commission licensee. *Id.* at 13. Specifically, Press asserted that Rainbow had made misrepresentations to the Commission as to the nature of the tower dispute, and had falsely ascribed its failure to construct to the existence of the tower dispute. *Id.* at 14-15. Press maintained that the tower dispute did not prevent Rainbow from constructing; rather, Rainbow chose not to proceed with construction. *Id.* Press also contended that Rainbow had engaged in an abuse of process by aggressively challenging Press's request that the Commission permit Press to exchange its television channel.[6] *Id.* at 18-19. In addition, Press alleged that Rainbow had engaged in abuse of process by initiating the tower litigation, which Press alleged was for the sole purpose of quelling competition while its own construction permit sat idle. *Id.* Finally, Press also asserted that Rainbow was not financially qualified, since Rainbow was unable to proceed with construction absent approval of the assignment application and an additional infusion of capital. *Id.* at 15-16.

14. Rainbow filed an opposition to Press's contingent application for review. *See* "Rainbow Opposition to Press Contingent Application for Review." Rainbow stated that the Bureau's grant of the extension was justifiable and consistent with the Commission's rules, which afford applicants 24 months to construct. *Id.* at 8-11. Contrary to Press's assertions, Rainbow stated that the Bureau had correctly found that Rainbow never had a full 24-month construction period. *Id.* In that connection, Rainbow claimed that it could not have been expected to proceed with construction while the validity of its authorization was subject to the five-year appellate process or during the two-year period its sixth extension application was pending. Rainbow also claimed that the Bureau's grant of its assignment application was consistent with Commission precedent and policy, which recognizes that financing plans are rarely effectuated as planned. *Id.* at 12-13. It cited in support *Urban Telecommunications Corp.*, 7 FCC Rcd 3867 (1992). Finally, Rainbow denied that it made any misrepresentations to the Commission, claiming that it had accurately reported the status of the tower dispute, as well as its financial qualifications. Rainbow maintained that it was ready to proceed, and that it had ordered its equipment following the Bureau's decision. *See* "Rainbow Opposition" at 13.

15. In reply, Press reiterated its previous arguments and emphasized that while Rainbow might not have been required to construct during the five-year appellate process, it *could* have done so and should have at least made "plans for construction" during that period. *See* "Reply of Press to Rainbow Opposition to Press Contingent Application for Review" at 3. Instead, Press argued, Rainbow had made *no* progress during that period, and virtually "*no* progress during the three years following finality of its permit." *Id.* (emphasis in original). According to Press, Rainbow's lack of diligence militates against a further extension of time to construct. *Id.*

III. INSPECTOR GENERAL'S REPORT

16. Subsequent to the filing of those pleadings, the Commission's Inspector General, on November 22, 1993, concluded an investigation into the allegations of improper *ex parte* communications.[7] *See Report by Inspector General of Investigation of Violation of Ex Parte Rule by Mass Media Bureau Personnel to the Chairman ("Report").*[8] *In his Report,* the Inspector General concluded that Rainbow had violated the Commission's *ex parte* rules by soliciting a third party to call the Commission on Rainbow's behalf and by meeting and discussing the merits of Rainbow's application proceedings with Mass Media Bureau officials.[9] Pursuant to a Freedom of Information Act request filed by Press on January 14, 1994, this *Report* was made publicly available on February 18, 1994. On March 8, 1994, Press and Rainbow were invited to file initial and reply comments on the findings in the *Report* insofar as they related to disposition by the Commission of Rainbow's applications.[10]

---

[6] *See Amendment of Section 606(b), Table of Allotments, Television Broadcast Stations (Clermont and Cocoa, Florida),* 4 FCC Rcd 8320 (MMB 1989), *review denied,* 5 FCC Rcd 6566 (1990), *aff'd sub nom., Rainbow Broadcasting Company v. FCC,* 949 F.2d 405 (D.C. Cir. 1991). In that proceeding, Press, as permittee of Channel 68, Clermont, Florida, sought and was granted a channel exchange with the noncommercial licensee of Channel 18, Cocoa, Florida.

[7] The investigation was undertaken by the Inspector General based upon an August 3, 1993, complaint about the meeting held between Mass Media Bureau officials and representatives of Rainbow.

[8] The *Report* was submitted to Acting Chairman Quello, pursuant to section 4(a)(5) of the Inspector General Act of 1978, as amended, and 47 C.F.R. §0.13.

[9] The Inspector General acknowleged, however, that "traditionally the Office of General Counsel renders legal opinions regarding the applicability of the *ex parte* rules in specific cases" and, elsewhere, that "it is OGC and not the OIG that interprets the rule for the Commission." *Report* at 5-6.

[10] On December 10, 1993, Press had also filed an "Emergency Petition for Extraordinary Relief to Require Compliance with Administrative Procedure Act and the Commission's Ex Parte Rules." In it, Press requested (1) full disclosure of *ex parte* contacts relevant to Rainbow's applications or any pleadings related thereto; (2) an opportunity to review those communications, comment upon them, and seek such further disclosure as may appear warranted based upon its review. Press further requested from the Commission an acknowledgement that the Commission was aware of and committed to providing the protections afforded by the Administrative Procedure Act against the possibility of taint by *ex parte* presentations. Press's requests have been met *inter alia*, by release of the *Report* of the Inspector General in response to Press's Freedom of Information Act request; compliance with an order by the United States

17. Rainbow, in its comments, states that the Inspector General's finding of *ex parte* violations is based upon his erroneous legal conclusion that the proceeding is a restricted proceeding. In Rainbow's view, the proceeding was exempted from the *ex parte* rules, so that the *ex parte* contacts were permissible.[11] *See* "Comments of Rainbow Broadcasting, Ltd. on Inspector General's Report" at 1-2.

18. Rainbow also takes issue with the Inspector General's statement that Press "vigorously opposed Rainbow's requests." *Id.* at 7. Rainbow contends that Press lacked standing to oppose its extension and assignment applications and, therefore, because of the informal nature of Press's objections and its lack of standing to oppose the applications, the *ex parte* restrictions did not apply. *Id.* at 7-8. Similarly, because Press denominated the caption of its February 15, 1991, filing as an "Informal Objection," and because Press's filing occurred after grant of the extension request, Rainbow contends that Press's filing did not, contrary to the Inspector General's *Report*, change the exempt status of the application proceedings.[12] *Id.* at 9-10. Rainbow further states that Press's subsequent filing of a petition for reconsideration did not change the status of the proceeding from exempt to restricted since, according to Rainbow, section 1.106 of the Commission's Rules does not confer standing for the filing of such petitions by informal objectors. *Id.* at 10. In this regard, Rainbow cites *Redwood Microwave Association, Inc.*, 61 FCC 2d 442 (1976). Even if section 1.106 did permit such a filing, Rainbow maintains that Press failed to meet that section's requirements as to how its interests were adversely affected or why it could not have participated earlier in the proceeding. *See* Rainbow Comments at 10.

19. Nor, in Rainbow's view, did Press's petition for reconsideration qualify as a "formal opposition" that made Rainbow's application proceedings "restricted." According to Rainbow, because the text of Press's petition allegedly conceded that it was an informal objection, the petition could not be properly construed as a "formal opposition." *Id.* at 10-12. Along the same lines, Rainbow states that Press's subsequent filings suffered from this same defect and thus did not meet the requirements of section 1.1202(e)(1)(i).[13] *Id.* at 13. In addition, notwithstanding the Inspector General's reliance on the letter from the Office of Managing Director (OMD) describing the application proceeding as "restricted," Rainbow contends that the proceeding was not restricted with respect to Rainbow, but only with respect to other parties. *Id.* at 18-19. In support of that contention, Rainbow relies on the note to section 1.1204(a)(1), which states that oral *ex parte* communications are permissible in unopposed adjudications, but only between the Commission and the formal party to the proceeding. *Id.*

20. In addition, Rainbow notes that its attorney and the Mass Media Bureau Chief and Television Branch Chief had collective FCC experience of more than 80 years and contends that each independently concurred that the proceeding was not restricted by Press's informal objection.[14] *Id.* at 19. Finally, Rainbow states that it should have been given an opportunity to review and comment on the *Report* before it was made public, and that it was highly prejudicial to Rainbow and injurious to those who did nothing wrong to have such a report released with no notice. *Id.* at 28. Rainbow asserts that the Commission should make unequivocally clear that no wrongdoing occurred under the *ex parte* rules. *Id.* at 28-29.

21. Press, in its comments, agrees with the Inspector General's conclusion that there were "multiple violations of the *ex parte* rules by and on behalf of Rainbow." *See* "Comments of Press Broadcasting Company, Inc. on Report of the Office of the Inspector General" at 4. According to Press, the Managing Director's letter put Press and Rainbow on notice that Press's pleadings were deemed to be formal oppositions which triggered the *ex parte* rules. *Id.* As the *Report* indicated, Press emphasizes, Bureau staff counsel had informed Rainbow of the Managing Director's conclusion, so Rainbow should not have been confused or unsure about the *ex parte* status of the proceeding. *Id.* at 4-5. Press further speculates that the Office of General Counsel and the Commissioners' offices may be tainted by the improper *ex parte* status of the proceeding. Press suggests that the Commission should instruct the Inspector General to continue his investigation with specific reference to the agency's overall course of conduct in this matter.[15] *Id.* at 6. On April 6, 1994, reply comments were filed by Press and Rainbow.

Court of Appeals for the District of Columbia Circuit dated March 4, 1994, granting in part Press's request for issuance of subpoenas to particular Mass Media Bureau officials; the March 8 letter from the Office of General Counsel requesting initial and reply comments from Press and Rainbow on the Inspector General's *Report;* and, finally, by our independent review of the record, which ensures that the Commission's decision-making process in this proceeding is impartial.

[11] Rainbow states when it learned on June 18, 1993, that its applications had been denied, not once during the conversation did Commission staff say that the proceeding was restricted or that the *ex parte* rules applied or that it would be improper to talk to or meet with the Television Branch Chief or Mass Media Bureau Chief. *See* Rainbow Comments at 7.

[12] Under section 1.1202(e) of the Rules, a pleading must, among other things, be timely filed to qualify as a "formal opposition."

[13] Rainbow also maintains that each application was a separate proceeding under section 1.1202(d) of the Commission's Rules and thus, the different application proceedings did not become one for purposes of the *ex parte* rules. *See* Rainbow Comments at 15.

[14] Rainbow also disagrees with the Inspector General's suggestion that it should not have solicited an *ex parte* presentation from a third party. Rainbow states that the *Report*'s conclusion that the outside party was precluded from making a status inquiry is wrong since status inquiries are never precluded. *See* Rainbow Comments at 21.

[15] Press has also requested the U.S. Court of Appeals for the District of Columbia Circuit to (1) rescind the Bureau's order granting Rainbow's extension of time; (2) authorize Press to issue subpoenas to Commission officials; and (3) relieve the Commission "of any authority to influence the disposition of Rainbow's permit." Motion for Extraordinary Relief at 16-17 (filed Feb. 22, 1994). In response, the court authorized Press to issue subpoenas to three Mass Media Bureau officials. The affidavits from those officials state that, contrary to Press's theory, neither any Commissioner nor any member of a Commissioner's staff contacted the Bureau concerning Rainbow's extension request. Affidavits of Chief, Mass Media Bureau at 3 ¶10, Chief, Video Services Division at 5 §16, Chief, Television Branch at 5 ¶12. The court also held oral argument on Press's request for extraordinary relief on April 18, 1994. The Commis-

IV. DISCUSSION

22. We conclude that Rainbow violated the Commission's *ex parte* rules. However, recognizing that Rainbow's counsel apparently sincerely believed that the proceeding was not restricted and has advanced a plausible argument in support of that belief, we conclude that no sanction should be imposed. We further conclude based on an independent review of the record without participation of the Mass Media Bureau that Rainbow's sixth extension application should be granted. Finally, we reject Press's other arguments in support of its contention that Rainbow's construction permit should be cancelled.[16] *Ex Parte Allegations*

23. At the heart of this dispute are two *ex parte* contacts. The first was a telephone call made in late June of 1993 by Antoinette Cook, who then was the Senior Counsel to the Senate Subcommittee on Communications, to the Chief of the Mass Media Bureau. The call was made at the request of Rainbow's attorney. In that call, the Subcommittee Counsel asked whether the staff's June 18 decision cancelling Rainbow's construction permit was consistent with Commission policies encouraging minority ownership of broadcast stations. Affidavit of Chief, Mass Media Bureau at 1 ¶ 2. The second *ex parte* contact was the July 1, 1993, meeting between the Mass Media Bureau staff, Rainbow's attorney, and one of Rainbow's principals at which Rainbow's applications were discussed.[17] Press has also speculated that Rainbow, or the Subcommittee Counsel at Rainbow's request, may have contacted a Commissioner or a member of a Commissioner's immediate staff last Summer, which, in Press's view, would taint the Commission.[18] The Commission is not tainted.[19]

24. At the outset, we note that the Administrative Procedure Act's provisions regarding *ex parte* presentations relate only to on-the-record hearings, and thus are not relevant to this proceeding. *See* 5 U.S.C. §557(d). Turning to our *ex parte* rules and the allegations before us, we conclude, contrary to Rainbow's contentions, that the application proceedings plainly were interrelated. That is, for example, the fifth and sixth extension requests should not be regarded as separate proceedings, and an *ex parte* presentation prohibited in the one was also prohibited in the other related application proceedings. Press's filings confirm that the matters were interrelated. For example, in its February 15, 1991, informal objection and in its February 25, 1991, petition for reconsideration, Press clearly raised the question of Rainbow's fitness to be a Commission permittee. This same issue pertained to and was also raised by Press in its later filings in the context of Rainbow's June 21, 1991, extension and subsequent assignment applications. Because this and other issues raised by Press in its petition for reconsideration of the Bureau's February 10, 1993, extension grant to Rainbow were incorporated by Press in its later filings against Rainbow's other applications, they were clearly interrelated. We therefore disagree with Rainbow's assertions that each Rainbow application constituted a separate and different proceeding for purposes of the *ex parte* rules. Instead, we hold that if an *ex parte* presentation was prohibited in the earlier application proceeding, it was also prohibited in the other related application proceedings.

25. Having concluded that the proceedings were interrelated, we must next determine whether the proceedings were "restricted" for *ex parte* purposes. At the outset, we agree with Rainbow that Press's February 15, 1991, "informal objection" to Rainbow's January 25, 1991, extension application did not meet the requirements of a "formal opposition" under section 1.1202(e) of our Rules. Therefore, the informal objection did not make that or the subsequent proceedings "restricted" for purposes of the *ex parte* rules. Section 1.1202(e)(1) explicitly requires that "[t]he caption and text of a pleading make it unmistakably clear that the pleading is intended to be a formal opposition or formal complaint." It is not unmistakably clear from the caption that a formal opposition was intended because Press's February 15, 1991, pleading was captioned "informal objection."

26. Press points to the Commission's decision in *William J. Kitchen*, 71 RR 2d 144 (1992), for the proposition that its "informal objection" was nevertheless a "formal opposition." In *William J. Kitchen*, we did state that "an informal objection which meets the criteria for a formal opposition set out in the *ex parte* rules is sufficient to render the proceeding restricted." *Id.* at 146. However, in that case, the Commission rejected the petitioner's argument that its opposition, which was captioned "Informal Objection," made a proceeding restricted. *Id.* That conclusion was consistent with the Commission's intent to establish a "bright

---

sion argued that extraordinary relief was not warranted for numerous reasons, including the fact that this order, once released, will be subject to judicial review.

[16] On December 13, 1993, Rainbow filed a minor modification application. Also, on January 28, 1994, Press filed a "Complaint Concerning Unauthorized Installation of Broadcast Equipment" against Rainbow. As stated in a March 25, 1994, letter in response to Rainbow's request for immediate consideration of that application and request for special temporary authority to commence program tests, action would be deferred "until the Commission resolve[d] the underlying validity of Rainbow's construction permit." Now that we have resolved that question, we direct the Mass Media Bureau to resume processing of Rainbow's requests and to review the merits of Press's complaint. Of course, the Bureau's decisions on those technical matters will be subject to review by the Commission.

[17] Rainbow is alleged by Press to have violated the *ex parte* rules on two other occasions: (1) by failing to serve Press with a copy of the minor modication application filed December 13, 1993 (file no. BMPCT-931213KE) and (2) by failing to serve Press with a copy of an April 12, 1993, response to the Video Services Division's March 18, 1993, request for information. Rainbow was required to file an FCC Form 301 to modify its construction permit under 47 C.F.R. §73.1690(b)(1) and because the application constituted an authorized *ex parte* presentation under section 1.1204(b)(1) of the Rules, it was not required to be served on Press . *See* 47 C.F.R. §1.1204(b)(1); *Daily Telegraph Printing Co.*, 59 FCC 2d 185, 194-95, *recon. denied*, 38 RR 2d 1545 (1976); and *George L. Lyon, Esq.*, 5 FCC Rcd 4672 (Man. Dir. 1990). As to Rainbow's failure to serve Press with a copy of its April 12, 1993, response, resolution of that issue turns on whether Rainbow's application proceedings were exempt or restricted. Since we conclude that the proceeding was restricted, we conclude that Rainbow should have served a copy of its response on Press. However, for the reasons explained *infra*, no sanction is warranted for that minor violation.

[18] *See* Motion for Extraordinary Relief at 13.

[19] Chairman Hundt did not join the Commission until November of 1993, and therefore is not tainted. Neither Commissioner Quello nor Commissioner Barrett nor their staffs were contacted by Rainbow or by anyone acting of Rainbow's behalf concerning this case.

line" test.[20] A pleading captioned "Informal Objection" fails to meet this bright line test because what is unmistakably clear from the caption is that an informal opposition is intended. As we stated in *Report and Order in Gen. Docket 86-225*, 3 FCC Rcd at 3015:

> If a person filing an objection considers it serious enough to warrant according a "restricted" status to the proceeding, then it is not unreasonable to require that person to *formally denominate the pleading a formal complaint, formal opposition or petition to deny*. . . ."

(Emphasis added). At the least, under *William J. Kitchen*, the objection must be captioned "objection" rather than "informal objection" if it is intended to restrict a proceeding.[21]

27. Even though the February 15, 1991, informal objection did not cause these proceedings to become restricted, we do find that the filing of Press's petition for reconsideration on February 25, 1991, restricted Rainbow's application proceedings for purposes of the *ex parte* rules. In *Catherine L. Waddill*, 8 FCC Rcd 2169, 2171 (1993), we expressly held that a proceeding becomes restricted upon the filing of a petition for reconsideration under section 1.1208. In a similar vein, in *Baltimore County*, 5 FCC Rcd 5615, 5618 (1990), we held that the filing of an application for review in a proceeding previously exempt for *ex parte* purposes causes the proceeding to become restricted. Although not expressly articulated in those decisions, implicit was a finding that the pleading in issue met the requirements of a formal opposition as required by section 1.1202(e) of the Rules.[22]

28. Press's petition for reconsideration meets the "bright line" test for a formal opposition. It is captioned as a "Petition for Reconsideration," which does not suggest informal opposition. The text of the petition makes it unmistakably clear that a formal opposition is intended since Press explicitly stated that it "hereby formally seeks reconsideration" and addressed the requirements of section 1.106 for the filing of a petition for reconsideration.[23] Thus, the filing of the petition for reconsideration restricted the proceeding under our *ex parte* rules.

29. Rainbow contends that the petition for reconsideration did not restrict the proceeding because Press lacked standing to file a petition for reconsideration. Nothing in our precedents would support such a conclusion, even if Press lacked standing to seek reconsideration.[24] Rainbow, therefore, could not ignore Press's petition for reconsideration while it was pending. Rainbow could have sought to have the petition for reconsideration dismissed for lack of standing, but it did not. Thus, for purposes of this order, what is important is that a petition for reconsideration, the text of which clearly indicated Press's intent to formally oppose, was pending in June and July of 1993 when Rainbow contacted the Mass Media Bureau. While the petition for reconsideration was pending and the proceeding was subject to further Commission or court review, Rainbow was obliged to treat the matter as a restricted proceeding. *See* 47 C.F.R. §1.1208(a).

30. We see more potential merit in Rainbow's contention that Press's petition for reconsideration should not be considered a formal opposition because it reiterated the arguments contained in Press's informal objection. Moreover, although we have held that petitions for reconsideration render a proceeding restricted, we have not previously addressed the precise question whether a petition seeking reconsideration of an informal opposition may be considered a formal opposition. However, we think our prior decisions, the text of our *ex parte* rule, and the goal of setting a bright-line rule support the conclusion that the filing of the petition for reconsideration restricted the proceeding even where there had previously been an untimely non-formal opposition. A "petition for reconsideration" suggests formal opposition, and the petition plainly stated that it was intended to be a formal opposition. Rainbow's suggestion that we consider the relationship of the filing to

---

[20] *See Report in Gen. Docket No. 86-225 Amendment of Subpart H, Part 1 of the Commission's Rules and Regulations Concerning Ex Parte Communications and Presentations in Commission Proceedings*, 2 FCC Rcd 3011, 3015 (1987)("it is essential that we have clear guidelines in this area").

[21] Because the *William J. Kitchen* case diametrically opposes, rather than supports, Press's argument that a pleading captioned "Informal Objection" can make a proceeding restricted for *ex parte* purposes, we find no merit in Press's related argument that, if the Bureau was aware of or involved in the *William J. Kitchen* case, it should have deduced or been aware that the Rainbow proceeding was restricted.

[22] *See also Report in Gen. Docket No. 86-225*, 2 FCC Rcd at 3015 (". . . an objector, merely by conforming to minimal procedural requirements, has it within his power to render the proceeding restricted' and thereby prevent *ex parte* presentations by the applicant" (footnote omitted)).

[23] What may have additionally clouded a correct perception of Press's petition for reconsideration for *ex parte* purposes is the fact that, in its filing, Press requested reconsideration "for all of the reasons set forth in its |Informal| Objection" which it incorporated by reference into its petition for reconsideration. An additional factor may have been Press's statement in the petition that its "concern is not with the particular procedural vehicle by which the issues might be raised" but rather that "the issues be substantively considered and resolved." *See* Press's Petition for Reconsideration at 2 & n.2.

[24] We conclude that Press had standing to file its petition for reconsideration. Under section 405 of the Communications Act, a petition for reconsideration may be filed by (1) a party to a proceeding or (2) "any other person aggrieved or whose interests are adversely affected by" the underlying decision.47 U.S.C. §405(a). Under the Commission's rules, to qualify under the second test, an entity must also show good cause why it was not possible for it to participate earlier. 47 C.F.R. §1.106(b)(1). Because Press did not (and indeed could not) file a procedurally proper petition to deny against the extension request, it does not have standing to file a petition for reconsideration *as a party*. *See, e.g., Dick Broadcasting Co.*, 8 FCC Rcd 3897 (1993); *Montgomery County Broadcasting Corp.*, 65 FCC 2d 876, 877 & n.2 (1977); *Redwood Microwave Association, Inc.*, 61 FCC 2d 442, 443 (1976). As an existing station in the market, however, Press does have standing to file a petition for reconsideration under the aggrieved/adversely affected test. *See FCC v. Sanders Bros.*, 309 U.S. 470 (1940). Moreover, since no formal pleading schedule was established for the fifth extension request and the request was granted before Press filed an opposition, Press has demonstrated good cause why it was unable to participate earlier. *See* H.R. Rep. No. 1800, 86th Cong., 2d Sess (1960), *reprinted in* 1960 U.S. CODE CONG. & ADMIN. NEWS 3516, 3519 (in justifying exceptions to 30-day notice period in section 309 to permit the filing of petitions to deny, House Interstate and Foreign Commerce Committee indicated that petitions for reconsideration could nevertheless be filed: "The remedy afforded by Section 405 of the Act would, however, be available in the event the Commission erred.")

prior filings requires more analysis than we consider appropriate, keeping in mind that the rules are intended to be as easy to apply as possible and that the effect of concluding that a proceeding is restricted merely means that another party must be served with filings or invited to meetings. Nevertheless, we understand why, in the absence of a clear ruling on this point, Rainbow may have concluded that the petition for reconsideration had no more effect on the character of the proceeding than did the informal objection Press asked the Commission to reconsider.

31. Because these proceedings were and continue to be "restricted" for *ex parte* purposes, we must examine each of the alleged instances of *ex parte* violations to determine whether in fact impermissible "presentations," *i.e.*, communications addressing the merits or outcome of these proceedings, were made to decision-making personnel. Based upon the information in the Inspector General's *Report*, it is clear that the communications at the July 1 meeting did in fact address the merits or outcome of Rainbow's applications.[25] Indeed, Rainbow concedes that if in fact the proceeding was restricted, the substance of the discussions at that meeting were prohibited under the Commission's *ex parte* rules. *See Report* at 11.

32. While it appears clear that the discussions at the July 1 meeting addressed the merits of Rainbow's applications, there does appear to be some dispute as to whether the telephone call from Senate Subcommittee Counsel to the Mass Media Bureau Chief shortly after the June 18 denial of Rainbow's applications was merely a status inquiry or constituted a "presentation" which addressed the merits or outcome of Rainbow's applications.[26] In her call, Senate Subcommittee Counsel pointed out to the Mass Media Bureau Chief that Rainbow was a minority broadcaster and raised the question whether the Bureau's action was consistent with the Commission's minority broadcasting policy.[27] Rainbow takes the position that the telephone call was merely a status inquiry. If that were so, the call was not prohibited by the *ex parte* rules, which prohibit "presentations" only.

33. Upon review of the available evidence, we conclude that a presentation did occur in the telephone call made to the Mass Media Bureau Chief.[28] In our *Report and Order in Gen. Docket 86-225*, 2 FCC Rcd 3013, we stated that a status inquiry is "generally a request for information that is solely related to the status of a proceeding." It appears that the conversation exceeded the boundaries of a permissible status inquiry under Section 1.1202(a) of the Rules even though only brief reference, in the form of a question, was made to the Bureau's action and its consistency with the Commission's minority broadcasting policy. Accordingly, that call violated the *ex parte* rules.[29] Even though we conclude that the telephone call constituted a "presentation" in violation of the *ex parte* rules, it is not clear from the record that Rainbow specifically requested the caller to make a "presentation," as opposed to a permissible status inquiry.

34. Although Rainbow's July 1 meeting with the Bureau staff clearly constituted a violation of our *ex parte* rules, the Inspector General in his *Report* noted that Rainbow appeared to be "sincere" in its belief that the proceeding was not restricted.[30] While this does not in any way excuse Rainbow's violation of the rules, it is a mitigating factor in addressing whether sanctions should be imposed.[31] Assuming that Rainbow also solicited the presentation made by Subcommittee Counsel, that violation also would be mitigated by Rainbow's sincere belief that the contact was permissible. In *Centel Corp.*, 8 FCC Rcd 6162, 6164 (1993), *petition for review dismissed sub nom. American Message Centers v. FCC*, No. 93-1550 (D.C. Cir. Feb. 28, 1994), *pet. for rehearing filed* April 14, 1994, we declined to disqualify a carrier, despite multiple *ex parte* violations, where the carrier "reasonably believed" that it had not engaged in impermissible contacts. We found, in those circumstances, that the violations did not raise a substantial question regarding the carrier's candor.[32] The Inspector General's finding regarding the sincerity of Rainbow's belief that its contacts were permissible is analogous to the situation in *Centel*. Finally, we have previously indicated that "isolated" *ex parte* violations, such as those here, are not a basis for disqualification. *See Pepper Schultz*, 4 FCC Rcd 6393 at 6403 and cases cited therein. In fact, in *Pepper Schultz* the Review Board noted that "no recent applicant had been found wholly unqualified to be a licensee, including those cases involving willful and repeated violations of the *ex parte* rules." *Id.* at 6404. It declined to disqualify a licensee that committed a "palpable" *ex parte* violation -- soliciting a Senator to write a letter to an administrative law judge concerning a contested license application. *Id.* at 6403.

---

[25] *See Report* at 11 ("All of the persons . . . described [Rainbow's] arguments at the meeting as going to the merits and the outcome of the proceeding: [Rainbow] argued that the June 18 letter had been wrongly decided and gave at least two specific reasons why it was wrong").

[26] Under section 1.1202(a) of our rules, a "presentation" is a "communication directed to the merits or outcome of a proceeding."

[27] Affidavit of Chief, Mass Media Bureau at 1 ¶ 2. Although the person is described in the Inspector General's *Report* as Senior Counsel of the Subcommittee on Communications of theH&0*' Senate Commerce Committee, the evidence is unclear as to whether she called in that capacity or in her individual capacity. On this point, Press, in reply comments, notes that the caller had previously represented Rainbow in private practice and further notes that, at the time at issue, she was on leave from her staff position with the Subcommittee.

[28] There does not appear to be any serious dispute that the subsequent follow-up telephone call from the Television Branch Chief to the same person did not involve a presentation.

[29] If the call had merely been a status inquiry, it would not have been contrary to our *ex parte* rules, even though it was solicited. 47 C.F.R. §§1.1202 and 1.1210. Because the call included a presentation regarding a restricted matter, it should not have occurred *ex parte*. However, once it occurred, a summary of the call should have been prepared and made available to the public. 47 C.F.R. §1.1212.

[30] *Report* at 11.

[31] *See Pepper Schulz*, 4 FCC Rcd 6393, 6403 (Rev. Bd. 1989), *rev. denied*, 5 FCC Rcd 3273 (1990) ("In considering what [sanction] may be appropriate, we point out that intent, while not a factor in determining whether a presentation has been made, is pertinent in weighing whether (and what) sanction is called for"); *see also Voice of Reason, Inc.*, 37 FCC 2d 686, 709 (Rev. Bd. 1972), *recon. denied*, 39 FCC 2d 847, *rev. denied*, FCC 74-476, released May 8, 1974 ("not established on this record that [applicant's] repeated violation of the *ex parte* rules was accompanied by inadvertence, good faith or overall innocent intentions").

[32] 8 FCC Rcd at 6165.

Consistent with this prior case law, we decline to find that Rainbow's violation is disqualifying or raises a substantial and material question of fact.[33]

35. We do believe, however, that the Managing Director's letter, as well as our prior decisions in *Waddill* and *Baltimore County*, should have raised a question sufficient to cause Rainbow to raise the issue with the Chief of the Mass Media Bureau before discussing the merits of the case with him. Under our precedents, an admonishment is warranted for its negligent failure to comply with the *ex parte* rules. *See Catherine L. Waddill*, 2 FCC Rcd at 2172 and *Centel Corporation*, 8 FCC Rcd at 6165. It should now be clear to counsel, parties, and their authorized agents that they have to inform relevant decision-makers as to the *ex parte* status of a proceeding and whether there are any questions or ambiguities in this connection and that they have a duty to raise potential *ex parte* issues if they are unsure as to the status of a proceeding.[34]

Extension and Assignment Applications

36. While we conclude that the *ex parte* violations should not be cause for Rainbow's disqualification, we must still decide whether to grant its extension request and assignment application.[35] Section 73.3598 of the Commission's rules affords permittees 24 months in which to construct new television stations. The Commission in 1985 lengthened the construction period from 18 to 24 months "in recognition of the substantial changes in the complexity and amount of the equipment needed and the growing multiplicity of business decisions involved in establishing a station." *Amendment of Section 73.3598 and Associated Rules Concerning the Construction of Broadcast Stations*, 102 FCC 2d 1054, 1055 (1985). At the same time, the Commission revised section 73.3534 of the Commission's rules to adopt strict standards for evaluating applications for extensions beyond the authorized two-year construction period. *Id.* at 1055-1056. Specifically, in order to obtain an extension beyond two years, a permittee must show either that it has completed construction and that testing is underway, that it has made substantial progress toward construction, or that circumstances beyond its control prevented its construction efforts. The Commission also added section 73.3535, which requires a permittee to make the same showing if it finds it necessary to file an assignment or a transfer application during the last twelve months of its authorized, two-year construction period. *Id.* at 1056.

37. We conclude that Rainbow was not afforded the normal 24-month construction period allowed under section 73.3535 and thus that its extension requests should have been granted. It would have been unreasonable to have required or expected Rainbow to proceed with construction while faced with the uncertainties resulting from the appellate challenges to its construction permit. Those judicial proceedings did not conclude until the Supreme Court denied a rehearing petition in August of 1990. Only five months had passed at the time Rainbow filed its fifth extension application in January of 1991. Similarly, only ten months had passed at the time Rainbow filed its sixth extension application in June of 1991. Because Rainbow effectively had less than 24 months in which to construct, we conclude that Rainbow should not have been required to make the showing specified under sections 73.3534 and 73.3535, which was intended to apply to permittees who already have been afforded a full 24-month construction period. Rather, Rainbow was in the position of a permittee that had not had 24 months to construct, and those permittees should not be subject to the same hurdles as those who have been accorded a full 24 months to construct.

38. Press maintains, however, that Commission policy, precedent, and practice has been to limit the grant of extension requests to six-month periods, notwithstanding the pending litigation over the underlying construction permit, and that no authority or precedent exists for the July 30 Bureau action which granted Rainbow an additional eight months to construct. While it is true that, in general, Commission practice has been to limit the grant of extension requests to six months, it also true that Commission practice has been not to deny further extensions requests where applicants, in circumstances similar to Rainbow's, have had less than the initial 24 months to construct. It is also true that, in these circumstances, we have not required applicants to make the showings normally required of permittees which have already had a full, unencumbered 24 months to construct. In short, we believe that it is irrelevant whether previous grants in such circumstances were limited to six-month intervals as long as, in their totality, such grants afforded applicants no less than the full 24 months provided in section 73.3598. Accordingly, we conclude that Rainbow was entitled to additional time in which to construct its facilities, regardless of its previous lack of progress in construction or whether its decision not to proceed due to the tower dispute was a circumstance within its control.[36] We thus conclude that Rainbow was entitled to two years from August 30, 1990, to construct its station and that requests for extensions to allow Rainbow the permissible two-year period should have been granted.

39. In addition, the period during which Rainbow's sixth extension application was pending should not be counted as part of its two-year construction period. Such an approach would be both unfair and inconsistent with well-established precedent. In order to discourage permittees from remaining idle and not proceeding with construction until their permit is about to expire or has expired, permittees are not entitled to rely on construction occurring after the expiration of their authorized construction period. *See High Point Community Television, Inc.*, 2 FCC Rcd 2506, 2507 (1987); *TV-8, Inc.*, 2 FCC Rcd 1218, 1220 (1987); *Michael C. Gelfand, M.D.*, 2 FCC Rcd 6522, 6523 (Mass Media Bur. 1987); *L.E.O. Broadcasting*, 2 FCC Rcd

[33] We include here the minor infraction by Rainbow in not serving Press a copy of its April 12, 1993, pleading.

[34] In a future proceeding, we may consider whether forfeitures should be imposed where counsel, parties, or their authorized agents have reason to believe that an *ex parte* issue is presented but do not alert Commission officials to the issue before going forward with presentations.

[35] As noted at the outset, our decision is based on our own independent review of the record. We have not relied upon the findings of the Mass Media Bureau Chief or his staff, who have not assisted us in reaching our decision.

[36] *Cf. TV-8, Inc.*, 2 FCC Rcd 1218, 1220 (1987)(where the Commission reinstated a permittee's grant in order to afford the permittee a full construction period of two years, irrespective of the permittee's lack of prior progress).

1810, 1811 (Mass Media Bur. 1987); *Cidra Broadcasters, Inc.*, 2 FCC Rcd 230, 231 (Mass Media Bur. 1987); *cf. Miami MDS Company v. FCC*, 14 F.3d 658 (D.C. Cir. 1994). Therefore, it would have been unreasonable to have required Rainbow to make further expenditures and proceed with construction efforts before the Commission granted its sixth extension request. *Cf. Channel 16 of Rhode Island, Inc. v. FCC*, 440 F.2d 266, 275-76 (D.C. Cir. 1971)(it is unfair and unreasonable to require construction while relevant FCC policy "remains in limbo").

40. We thus conclude that both the fifth and sixth extension applications should have been granted.[37] Indeed, as we believe Rainbow was entitled to a full two-year period after the decision regarding its grant became final, it could have requested an additional twelve, rather than eight, months to construct.[38] Thus, even though Rainbow in its recent submissions did not request a 12-month extension, we will nevertheless authorize a 12-month extension in order to give Rainbow the full 24-month period that initial construction permittees are ordinarily accorded.[39]

Misrepresentation/ Lack of Candor

41. The Commission necessarily must rely upon the truthfulness and accuracy of submissions by its applicants, and thus it holds its applicants to a high standard of integrity and honesty. *See WHW Enterprises, Inc. v. FCC*, 753 F.2d 1132, 1139 (1985); *Policy Regarding Character Qualifications in Broadcast Licensing*, 102 FCC 2d 1179, 1183, 1210-1211 (1986), *recon. denied*, 1 FCC Rcd 421 (1986). The Commission will not tolerate applicants' deliberate misrepresentations or omissions. *See Fox River Broadcasting, Inc.*, 93 FCC 2d 127 (1983).

42. We do not find that a substantial and material question of fact has been raised as to whether Rainbow made misrepresentations to the Commission regarding the nature of the tower dispute.[40] In its fifth extension application, Rainbow accurately described the tower dispute in terms of its asserted right of exclusivity to certain tower space. Moreover, Rainbow accurately reported that the realization of its right of exclusivity would have forced Press to abandon certain space on the tower.[41]

43. We also do not find that a substantial and material question of fact has been raised as to whether Rainbow made misrepresentations to the Commission by falsely ascribing its inability to complete construction to the tower dispute. Both in Rainbow's fifth extension application, which was filed while its requested preliminary injunction in connection with the tower dispute was pending, and in its sixth extension application, which was filed after the preliminary injunction was denied, Rainbow recited the five-year appellate process, which effectively prevented it from constructing.[42] Rainbow did not, however, represent to the Commission that the tower dispute precluded it from constructing. Indeed, in both its fifth and sixth extension applications, Rainbow consistently stated that, irrespective of the tower dispute, it would complete construction by December 31, 1992. Accordingly, a substantial and material question has not been raised that Rainbow made misrepresentations to the Commission, as Press claims.

Abuse of Process

44. Where a party files pleadings and takes other obstructive actions for the primary purpose of delaying or harassing its opponents, such actions undermine the Commission's processes and adversely reflect on the party's character to be a Commission licensee. *See Policy Regarding Character Qualifications in Broadcast Licensing*, 102 FCC 2d at 1211; *see also Viacom International, Inc.*, 2 FCC Rcd 3259, 3260 (1987); *Radio Carrollton*, 69 FCC 2d 1139, 1150-51, *clarified*, 69 FCC 2d 424 (1978), *aff'd sub nom., Faulkner Radio, Inc. v. FCC*, No. 79-1749 (D.C. Cir. October 15, 1980), *cert. denied*, 450 U.S. 1041 (1981). In evaluating Press's charge of abuse of process regarding Rainbow's oppositions to the television exchange proceeding involving Press,[43] the factors to be considered are whether: (1) Rainbow's principal or officer admitted that the actions were taken for obstructive purposes; (2) Rainbow withheld relevant information from the Commission in that proceeding; (3) Rainbow had established a reasonable basis for its objections; (4) Rainbow had an economic motivation to delay the proceeding; (5) Rainbow's other

---

[37] We note that the cases cited by Press are inapposite. *See, e.g., Community Service Telecasters, Inc.; Panavideo Broadcasting, Inc.; High Point Community Television, Inc.; Metrovision.* Unlike Rainbow, which had only ten months in which to construct at the time it filed its sixth extension request, the permittees or the assignees of the permit in each of the cited cases had received the full authorized construction periods to which they were entitled under sections 73.3598 and 73.3534(d), respectively. We also believe that Press's reliance on *Jamestown TV Associates*, 2 FCC 2d 4279 (Video Ser. Div. 1987), is misplaced. In that decision, the initial permittee had been accorded a full 18 months under the prior rule and, subsequent to the rule change, had also been granted an automatic extension (albeit not for a total of the full 24 months normally accorded initial permittees under the modified rule). The Bureau initially denied the permittee's extension request. Upon further review, however, the Bureau reconsidered its action and granted a further six-month extension to the permittee. *Jamestown TV Associates* should not be read to indicate that a permittee may rely upon the post-expiration period to complete construction as long as the construction permit has not been officially cancelled by the Commission, a conclusion that would be at odds with the cases cited above. Rather, it applied to peculiar circumstances arising when the normal construction period was extended beyond 18 months.

[38] Rainbow's fifth extension request had been granted by the Video Services Division, giving it until August of 1991 to complete construction. As we have explained, the 24-month period in which to construct extended to August of 1992.

[39] According to Rainbow's recent filings, however, including a Petition for Special Relief Pendente Lite filed with the D.C. Circuit on April 1, 1994, Rainbow is ready to commence broadcast service.

[40] *See Astroline Communications Co. v. FCC*, 857 F.2d 1556, 1561 (D.C. Cir. 1988); *Citizens for Jazz on WRVR, Inc. v. FCC*, 775 F.2d 392, 394 (D.C. Cir. 1985).

[41] Rainbow's Opposition to Press' Petition for Reconsideration to the grant of the fifth extension (March 12, 1991) at 4-5.

[42] As Rainbow has stated previously, "The foregoing chronology [the five-year appellate process] demonstrates that Rainbow has never been in a position to undertake construction on Channel 65, Orlando, absent the threat of judicial reversal of the license award." Rainbow's fourth extension application, File No. BPCT-820809KF, Exhibit 1.

[43] *See* n.6, *supra*.

conduct otherwise indicates that its purpose was primarily obstructive. *See Viacom International, Inc.*, 2 FCC Rcd at 3260-61; *Radio Carrollton*, 69 FCC 2d at 1150-51.

45. In this case, Rainbow's principals or officers have not admitted that they opposed Press's exchange of Channel 68 for Channel 18 for obstructive purposes.[44] Nor do we have any evidence that Rainbow withheld vital information in that proceeding. We also have no evidence that Rainbow lacked a reasonable basis for its opposition to the exchange proceeding. Rather, it appears that Rainbow grounded its opposition to Press's exchange on relevant statutory and regulatory provisions and policies, and therefore, while unsuccessful, had legitimate bases for its allegations.[45] We have no evidence that Rainbow's economic motivation to oppose the exchange was the primary purpose of its opposition. Indeed, we note that other licensees opposed the exchange as well. In these circumstances, we conclude that Press has not made a *prima facie* case that Rainbow engaged in an abuse of the Commission's processes.

Financial Qualifications

46. The Commission recognizes that projected costs and financing proposals are not necessarily effectuated as proposed. *See Revision of FCC Form 301*, 50 RR 2d 381, 382 (1981); *see also KRPL, Inc.*, 5 FCC Rcd 2823, 2824 (1990). Given the fact that Rainbow filed its application in 1982, it is not remarkable that almost ten years later Rainbow found it necessary to consider new financing sources and consequently filed its *pro forma* assignment application. *See George E. Cameron Jr. Communications*, 93 FCC 2d 789, 830-831 (Rev. Bd. 1983). The substitution or other rearrangement of financing "does not constitute the kind of change that would give rise to questions of misrepresentation," which would warrant a hearing. *See Urban Telecommunications Corp.*, 7 FCC Rcd at 3869-70.

47. Similarly, we conclude that certain statements made in the federal court litigation over the tower space do not call into question Rainbow's financial qualifications. In arguing to the contrary, Press points to expert testimony presented on Rainbow's behalf predicting that if Press were afforded access to the tower site and allowed to compete in the same market, Rainbow would be unable to secure financing and its license would become worthless. *See* Press's "Contingent Application for Review" at 16 and its February 15, 1991 "Informal Objection" at 8, 12-14. Press also refers to statements in the federal district judge's order which, in dismissing Rainbow's irreparable injury argument and denying its request for a preliminary injunction, stated that Rainbow appeared to lack sufficient financial backing. "Contingent Application for Review" at 16 n.18. While expert testimony presented on behalf of Rainbow included statements that it would be extremely difficult, if not impossible, in such circumstances for Rainbow to compete in the marketplace or secure financing for the station, they represented predictive judgments -- not factual statements -- as to obstacles Rainbow would face. More importantly, as predictive judgments, rather than factual statements, neither they nor the court's order were intended to address the entirely different question of whether Rainbow continued to meet *our* financial qualifications standard. That standard provides that applicants must demonstrate sufficient capital to construct the station and then operate for 90 days without advertising or other broadcast revenue.[46] On this point, Rainbow has not represented that sufficient funds are not available for the construction and operation of the station as required by the Commission's Rules. Indeed, to the contrary, Rainbow's completion of contruction would appear to belie the assertion that its financial qualifications under our rules is in question. Under the circumstances, we conclude that Press has not made a *prima facie* case that Rainbow lacked the requisite assurance of financing at the time it filed its construction permit application in 1982, that Rainbow's new financing strategy as evidenced by its *pro forma* application rendered Rainbow unqualified, or that Rainbow otherwise misrepresented its financial status. *See Urban Telecommunications Corp.; KRPL, Inc.*.

V. CONCLUSION

48. For the reasons stated above, based upon our independent review of the record, we conclude that the grant of an extension of time in which to construct, as well as the grant of Rainbow's *pro forma* assignment application, would serve the public interest, convenience, and necessity. Moreover, we find that there are no substantial and material questions of fact suggesting that Rainbow made misrepresentations to the Commission. We also find that Press has failed to make a *prima facie* case that Rainbow engaged in abuse of the Commission's processes, or that Rainbow was financially unqualified. Finally, we find that Rainbow, based upon its mistaken belief that the proceedings were exempt, violated the Commission's *ex parte* rules. In light of the plausibility and apparent sincerity of Rainbow's belief, we do not find its violations disqualifying, but admonish Rainbow and its counsel. We also indicate that, in the future, parties should alert Commission officials to questions regarding the status of a proceeding before engaging in *ex parte* contacts.

49. Accordingly, IT IS ORDERED THAT Rainbow IS HEREBY GRANTED a 12 month extension from the release date of this Memorandum Opinion and Order in which to construct its television station.

50. IT IS FURTHER ORDERED THAT Rainbow's application for *pro forma* assignment of its construction permit IS GRANTED.

51. IT IS FURTHER ORDERED THAT Press's Contingent Application for Review IS DENIED.

---

[44] As evidence of Rainbow's anticompetitive motive, Press points to the testimony in the federal court litigation of a Rainbow principal who, in response to a question regarding Rainbow's involvement in the television exchange proceeding, stated that the "[n]umber one reason is that they were proposing the same lease space that I have with Gannett" and that "[o]ther reasons are that they would become a competitor in my own marketplace." *See* Press's "Informal Objection" at 18-21 & Attachment B (Feb. 15, 1991). However, Rainbow did not suggest that it did not believe that its legal position was sound. In that regard, it is similar to Press in this proceeding -- Press apparently believes that its legal position is sound, but it is undoubtedly motivated to challenge Rainbow's construction permit because Rainbow is a potential competitor.

[45] Rainbow asserted that the positioning of Press's antenna on the same tower would cause unacceptable interference, that Press violated 47 U.S.C. §310(d) by effecting an unauthorized transfer of control, and that Press's exchange violated 47 C.F.R. §1.420(h) because the participating stations were not in the same market.

[46] *See* 47 C.F.R. §73.4101 and Public Notice "Financial Qualifications Standards," 72 FCC 2d 784 (1979).

52. IT IS FURTHER ORDERED THAT Press's Emergency Petition for Immediate Rescission, Setting Aside or Vacation of Action Taken Pursuant to Delegated Authority IS DIMISSED AS MOOT.

53. IT IS FURTHER ORDERED THAT Press's Emergency Petition for Extraordinary Relief IS DISMISSED AS MOOT.

54. IT IS FURTHER ORDERED THAT Rainbow's Request for Immediate Action IS DISMISSED AS MOOT.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

SEPARATE STATEMENT
OF
COMMISSIONER ANDREW C. BARRETT

In Re: Applications of Rainbow Broadcasting Company for an Extension of Time to Construct and for Assignment of its Construction Permit for Station WRBW(TV), Orlando, Florida (File Nos. BMPCT-910625KP, BMCPT-910125KE, BTCCT-911129KT)

In today's action, we granted Rainbow Broadcasting Company's application for an extension of time to construct facilities in Orlando, Florida, granted its application for *pro forma* assignment and have determined that Rainbow acted improperly when it violated the Commission's *ex parte* rules.

The Commission also emphasizes the responsibility for parties as well as their representatives to apprise Commission decision-makers as to the *ex parte* status of a proceeding and to raise any potential *ex parte* issues if they are uncertain about the status of an action. Further, the Commission advises that it will, through a future general proceeding, consider the imposition of sanctions where parties, their counsel or authorized representatives fail to alert Commission officials to the existence of an *ex parte* prior to a presentation about the merits of a matter.

While I support this general approach to *ex parte* issues, the Commission must bear the onus of making certain that its rules and . regulations with regard to *ex parte* issues are explicit.[1] Along these same lines, the Commission must also establish a definitive general process for *ex parte* challenges that incorporates standards for determining who bears the burden of establishing the existence of an alleged *ex parte* infraction as well as procedures for reviewing *ex parte* issues that arise during the course of the proceeding.

[1] I support the Office of Inspector General's (OIG) conclusions with respect to the complexity of our *ex parte* rules. In OIG's Report concerning this matter, it concluded that the rules need to be simplified and added that "[a] rule which governs the communications between hundreds of FCC employees and the public on a regular basis should be far less complex than the *ex parte* rule as now written." *See*, Office of Inspector General's Report dated November 23, 1993, p. 14.

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 94-59

In the Matter of

Amendment of Part 97 of the	RM-8218
Commission's Rules Concerning	RM-8280
HF Digital Communications in the	
Amateur Service.	

NOTICE OF PROPOSED RULE MAKING

Adopted: June 13, 1994; Released: June 23, 1994

Comment Date: October 1, 1994
Reply Comment Date: November 1, 1994

By the Commission: Commissioners Ness and Chong not participating.

I. INTRODUCTION

1. In this *Notice of Proposed Rule Making* (*Notice*), we propose to amend the amateur service rules to authorize automatic control[1] of stations transmitting a digital emission on the High Frequency (HF) amateur service bands.[2] This proceeding was initiated by two petitions for rule making.[3]

II. BACKGROUND

2. The propagation characteristics of the HF bands[4] allow for long distance communications. Amateur operators take advantage of these characteristics to communicate with other amateur stations, particularly with those in other countries. Establishing and maintaining a HF communications link, however, presents operating demands not encountered on the Very-High Frequency (VHF) and higher frequency bands frequencies above 30 MHz. The variables affecting communications in the HF bands are highly complex. To maintain the communications link and avoid causing interference to the communications of other amateur stations, the control operator constantly monitors the activity on the channel being used and adjusts the station's transmitting parameters as needed. Because the presence of the control operator has been imperative for proper operation in such systems, automatic control of an amateur station that is transmitting on an HF band has not been authorized.[5]

3. In 1986, however, automatic control of amateur stations transmitting digital communications[6] on the VHF and higher frequency bands was authorized.[7] In the same proceeding, the Commission indicated an interest in also authorizing automatic control of amateur stations transmitting digital communications in the HF band. In this regard, the Commission noted that a feasibility study planned by The American Radio Relay League, Inc. (ARRL) would be helpful in determining if any rule changes were necessary to prevent interference to and from other amateur service communication.[8] The ARRL's petition is the result of that study.

III. DISCUSSION

4. According to the ARRL, its project was carried out under Special Temporary Authority we granted to some fifty amateur stations. It states that these stations were assembled as an automated digital communication system on the 20 meter HF band based upon the packet radio protocol used generally by amateur stations on the VHF bands.[9] Based on the experience gained managing this system, the ARRL concludes that the only regulatory safeguard needed to prevent interference to other stations is to restrict those stations that engage in automatically controlled station transmissions to specific subbands within the eight HF bands where data and RTTY emission types may be transmitted. The ARRL believes that this approach will provide advance notice to other amateur operators that they may receive interference to their communications from automatically controlled stations should they attempt to operate their stations in these subbands.[10] The ARRL

---

[1] Section 97.3(a) of the Commission's Rules, 47 C.F.R. § 97.3(a), defines automatic control as the use of devices and procedures for control of a station when it is transmitting so that compliance with the Commission's Rules is achieved without the control operator being present at a control point. Only stations specifically designated in the rules may be automatically controlled.

[2] Section 97.3(c) of the Commission's Rules, 47 C.F.R. § 97.3(c), authorizes amateur stations to use any of eighteen data and RTTY emission types when transmitting digital communications. The nine data emission types enable amateur stations to transmit telemetry, telecommand, and computer communications. The nine RTTY emission types enable amateur stations to transmit narrow-band direct-printing telegraphy communications.

[3] RM-8218 was filed by The American Radio Relay League, Inc. (ARRL). RM-8280 was filed by the American Digital Radio Society, Inc., (ADRS). The ARRL also filed comments strongly supporting RM-8280.

[4] Of the nine frequency segments allocated to the amateur service in the HF (3-30 MHz) portion of the radio spectrum, data and RTTY digital emissions may be transmitted on all but the 75 meter band (3.75-4.00 MHz.)

[5] The rules applicable to amateur service message forwarding systems were revised effective June 1, 1994, in PR Docket No. 93-85. *See Report and Order*, PR Docket No. 93-85, 9 FCC Rcd 1786 (1994). These revisions, however, did not authorize automatic control of stations transmitting on the HF bands. *See also, Public Notice*, Report No. DC-2605, June 2, 1994.

[6] Automatic control of digital communications allows amateur operators to utilize high-speed computer-based message technology for the rapid and accurate relaying of messages and data.

[7] *See Report and Order*, PR Docket No. 85-105, 51 Fed. Reg. 3069 (1986).

[8] *See Memorandum Opinion and Order*, PR Docket No. 85-105, 1 FCC Rcd 166 (1986).

[9] The protocol was the American Radio Relay League, Inc. AX.25 *Amateur Packet-Radio Link-Layer Protocol, Version 2.0*, October 1984.

[10] ARRL petition at 18-19.

recommends that the subbands be those it has coordinated with other amateur radio societies in North and South America.[11]

5. In its petition, the American Digital Radio Society (ADRS) states that it also believes that automatic control in the HF bands is workable[12] as long as proper safeguards for other users of these bands are included.[13] It agrees that communications between automatically controlled stations should be confined to the ARRL-recommended subbands.[14] The ADRS also recommends, however, that communications between a locally or remotely controlled station and an automatically controlled station should be permitted on any frequency authorized for data and RTTY emission types.[15] It argues that the potential for interference is much less from stations operating in this configuration because the control operator of the locally or remotely controlled station can terminate the transmissions from all the stations. In its comments, the ARRL supported the ADRS petition.[16]

6. We are gratified by the cooperation and dedication of organizations within the amateur service community in determining the conditions necessary to allow automatic control of stations transmitting data and RTTY emission types on the HF amateur service bands. We concur with the petitioners that automatic control of amateur stations in the HF bands can, with the safeguards recommended, make the transmission of data and RTTY emission types practical and effective.[17] Also like the petitioners, we believe that the potential for interference to the communications of other amateur stations will be mitigated by rules based upon their recommendations. We propose, therefore, to authorize automatic control for stations transmitting data and RTTY emission types on the subbands recommended by the ARRL. We also propose to authorize communications between a locally or remotely controlled station and an automatically controlled station on any frequency where data and RTTY emission types are otherwise authorized.[18] These proposed rules are intended to facilitate the development of digital communications on the HF amateur service bands. We request comments on these proposals.

IV. CONCLUSION

7. We firmly believe in the principle that government should be responsive to user needs.[19] The rules that we are proposing are the result of a successful feasibility project planned and carried out within the amateur service community. They are responsive to the recommendations of two organizations dedicated to bringing the benefits to be derived from the transmission of digital communications on the amateur service HF bands to amateur operators in the United States and elsewhere without causing unnecessary interference to other types of communications.

V. PROCEDURAL MATTERS

Ex Parte Rules - Non-Restricted Proceeding

8. This is a non-restricted notice and comment rule making proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in Commission Rules. *See generally* 47 C.F.R. §§ 1.1202, 1.1203, and 1.1206(a).

Regulatory Flexibility Act

9. We certify that the Regulatory Flexibility Act of 1980 does not apply to this rule making proceeding because, if the proposed rule amendments are promulgated, there will not be any significant economic impact on small business entities, as defined by Section 601(3) of the Regulatory Flexibility Act. The amateur service may not be used to transmit communications for compensation, for the pecuniary benefit of the station control operator or the station control operator's employer, or for business communications on a regular basis. *See* 47 C.F.R. § 97.113(a). The Secretary shall send a copy of this Notice of Proposed Rule Making, including the certification, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 605(b) of the Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. 601-612 (1981).

Comment Dates

10. Authority for issuance of this *Notice* is contained in Sections 4(i), 303(b), 303(g), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 303(b), (g), and (r). Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. §§ 1.415 and 1.419, interested parties may file comments on or before October 1, 1994, and reply comments on or before November 1, 1994. To file formally in this proceeding, you must file an original and five copies of all comments, and reply comments. To file informally, you must file an original and one copy of your comments, provided only that the Docket Number is specified in the heading. You should send comments and reply comments to: Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection

---

[11] ARRL petition at 15-16.

[12] ADRS petition at 1-2. ADRS members are Commission-licensed amateur radio operators interested primarily in developing digital communications technology.

[13] ADRS petition at 6.

[14] ADRS petition at 11.

[15] ADRS petition at 10-11.

[16] Comments of the ARRL in Response to RM-8280 at 8.

[17] Other examples of designated subbands to minimize interference include subbands for repeater stations, Section 97.205(b) of the Commission's Rules, 47 C.F.R. § 97.205(b), and a weak-signal subband recently established at 220.00-222.15 MHz. *See Report and Order* PR Docket No. 92-289, 8 FCC Rcd 8428 (1993).

[18] Stations are authorized to transmit a RTTY or data emission on frequency segments specified in Section 97.305(c) of the Commission's Rules, 47 C.F.R. § 97.305(c). On the HF bands, these subbands are separate from the subbands where analog emission types are authorized.

[19] Vice President Al Gore, Report of the National Performance Review, From Red Tape to Results: Creating a Government That Works Better and Costs Less, at 6-8 (1993). The Vice President's Report stresses putting people first. Serving customers and cutting costs are two of its key principles. This *Notice* embraces these principles by seeking ways to allow amateur service licensees to use efficient technologies that are now available so that they can operate their stations in the manner they desire.

during regular business hours in the FCC Reference Center (Room 239) of the Federal Communications Commission, 1919 M Street, N. W., Washington, D.C. 20554.

11. For further information, contact William T. Cross, Personal Radio Branch, Private Radio Bureau, (202) 632-4964.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

APPENDIX

Part 97 of Chapter I of Title 47 of the Code of Federal Regulations is proposed to be amended as follows:

1. The authority citation for Part 97 would continue to read as follows:

Authority citation: 48 Stat. 1066, 1082, as amended; 47 U.S.C. §§ 154, 303. Interpret or apply 48 Stat. 1064-1068, 1081-1105, as amended; 47 U.S.C. §§ 151-155, 301-609, unless otherwise noted.

2. Section 97.109 is amended by revising paragraphs (d) and (e) to read as follows:

§ 97.109 Station control.

(d) When a station is being automatically controlled, the control operator need not be at the control point. Only stations specifically designated elsewhere in this Part may be automatically controlled. Automatic control must cease upon notification by an EIC that the station is transmitting improperly or causing harmful interference to other stations. Automatic control must not be resumed without prior approval of the EIC.

(e) No station may be automatically controlled while transmitting third party communications, except a station transmitting a RTTY or data emission. All messages that are retransmitted must originate at a station that is being locally or remotely controlled.

3. Subpart C of Part 97 is amended by adding new Section 97.221 to read as follows:

§ 97.221 Automatically controlled digital station.

(a) This rule section does not apply to an auxiliary station, a beacon station, a repeater station, an earth station, a space station, or space telecommand station.

(b) A station may be automatically controlled while transmitting RTTY or data emissions on the 6 m or shorter wavelength bands, and on the 28.120-28.189 MHz, 24.925-24.930 MHz, 21.090-21.100 MHz, 18.105-18.110 MHz, 14.0950-14.0995 MHz, 14.1005-14.112 MHz, 10.140-10.150 MHz, 7.100-7.105 MHz, or 3.620-3.635 MHz segments.

(c) A station may be automatically controlled while transmitting a RTTY or data emission on any other frequency authorized for such emission types provided that:

(1) The station is responding to interrogation by a station under local or remote control; and

(2) No transmission from the automatically controlled station occupies a bandwidth of more than 500 Hz.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Sencon Incorporated, Complainant,

File No. E-94-44

v.

American Telephone and Telegraph Company, Defendant.

FEDERAL COMMUNICATIONS COMMISSION

Thomas D. Wyatt
Chief, Formal Complaints and Investigations Branch
Common Carrier Bureau

ORDER

Adopted: June 15, 1994; Released: June 23, 1994

By the Chief, Formal Complaints and Investigations Branch, Enforcement Division, Common Carrier Bureau:

1. On February 15, 1994, Sencon Incorporated (Sencon) filed the above-captioned formal complaint against American Telephone and Telegraph Company (AT&T) seeking monetary damages allegedly incurred as a result of collection efforts by AT&T against an end-user customer of Sencon. AT&T denied the allegations and moved to dismiss the complaint. Under the auspices the Enforcement Division,[1] the parties entered into negotiations aimed at settling their disputes. By joint motion filed May 13, 1994, the parties advised the Commission that they wished to dismiss the complaint with prejudice stating that a mutually agreeable general release had been signed by both parties settling all pending controversies.

2. We are satisfied that granting the parties' motion to dismiss the complaints will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and of the Commission.

3. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated in Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, that the parties' Joint Motion to Dismiss IS GRANTED.

4. IT IS FURTHER ORDERED that the above-captioned complaint IS DISMISSED WITH PREJUDICE and the proceeding IS TERMINATED.

[1] During a status conference held on May 3, 1994, the parties voluntarily submitted their disputes to Enforcement Division staff responsible for administering the Commission's pilot Alternative Dispute Resolution (ADR) program. As a result of the parties' and staff's AFR efforts, a mutually agreeable resolution was reached.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Susan Jacobs Designs, Inc.
Licensee of 800 MHz Specialized Mobile Radio Service (SMR) Station WNZW 762.
West Palm Beach, Florida

FCC File No. 579059

ORDER

Adopted: June 13, 1994; **Released: June 24, 1994**

By the Commission:

INTRODUCTION AND BACKGROUND

1. On February 16, 1993, United States Sugar Corporation ("U.S. Sugar") filed an Application for Review challenging the grant of a license to Susan Jacobs Design, Inc. to operate a five channel trunked SMR system 52.46 miles from U.S. Sugar's station KNAV258. For the reasons that follow, U.S. Sugar's Application for Review is denied.

2. Susan Jacobs Design filed for a license to operate a five channel trunked SMR station on March 25, 1992. With its application, Susan Jacobs Design filed a request seeking a waiver of the 70 mile separation requirement contained in 47 C.F.R. § 90.621(b).[1] In support of the waiver, Susan Jacobs Design submitted an engineering analysis that utilized the R6602 curve propagation model. This model is used routinely by the Commission. The engineering analysis demonstrated that the 40 dBu/22 dBu predicted contours between co-channel licensees would not overlap.

3. U. S. Sugar submitted an opposition and an engineering analysis of the interference potential of the new station based on another propagation model, the Longley-Rice Irregular Terrain and Longley Vegetation model. U.S. Sugar's engineering study reported that the 40 dBu/22 dBu predicted contours of the proposed Susan Jacobs Design station and U.S. Sugar's station KNAV258 overlap. U.S. Sugar argues that because the R6602 curve propagation model is based on average terrain and because Florida is flat, when the R6602 curve model is used in Florida, co-channel licensees are not afforded the interference protection intended by the Rules.

4. The Commission staff, pursuant to delegated authority, reviewed both engineering studies. The staff dismissed the U.S. Sugar opposition because U.S. Sugar failed to adequately support and document the assumptions it used in preparing its engineering analysis. The staff also concluded that U.S. Sugar failed to show that 40 dBu/30 dBu protection was not present. At that time, the Commission's policy was that waiver requests were granted if the 40 dBu/30 dBu predicted contours did not overlap (10 dBu desired to undesired signal ratio).

5. U.S. Sugar, on September 14, 1992, petitioned for reconsideration of the August 13, 1992 grant to Susan Jacobs Design. The petition again asserted that the R6602 curve propagation model was not applicable in Florida due to the flat terrain. Petitioners also argued that co-channel licensees should be afforded more than 40 dBu/30 dBu protection.

6. By letter dated January 14, 1993, the staff denied the petition for reconsideration. Because U.S. Sugar failed to support its use of the Longley-Rice Irregular Terrain model and Longley Vegetation model, and because it failed to consistently apply even the unsupported vegetation loss factor in its analysis, the staff concluded that U.S. Sugar had not demonstrated that the August 13, 1992 grant was in error. The letter also noted that U.S. Sugar's analysis afforded it more protection than the criteria used to arrive at the co-channel separation specified in the Rules.

DISCUSSION

7. The Commission has, for almost two decades, utilized the R6602 curve propagation model to calculate appropriate separation distances. *See, In the matter of Co-Channel Protection Criteria for Part 90, Subpart S Stations Above 800 MHz*, 8 FCC Rcd 7293 (Adopted September 23, 1993)("Short Spacing Report and Order"); *Notice of Proposed Rulemaking*, PR Dkt 93-60, 8 FCC Rcd 2454 (1993); *Second Report and Order*, Dkt No. 18262, 46 FCC 2d 752, 773-75 (1974). The Commission has recognized that although its choice of models may not be ideal, given the need to have a reliable model for typical systems and at the same time have a model that is not so sophisticated as to be burdensome to applicants and the Commission, no clear mandate for a better model is present. 8 FCC Rcd at 7296-97. In the Notice of Proposed Rule Making we asked for comments regarding the use of the R6602 curve model as well as other models (including the model used by U.S. Sugar for its engineering in this proceeding). Having reviewed the comments, we decided to defer any decision on choosing a new model as the Commission standard. Therefore, the R6602 curves remain the Commission's standard model for predicting the contours between short spaced stations.[2]

8. The R6602 model provides a presumptively correct prediction of field strengths. At the time of this application, waivers of § 90.621(b) were granted if the applicant could show that the 40 dBu/30 dBu predicted contours did not overlap.

[1] Rule § 90.621(b)(4) states that applicants seeking to be licensed for systems closer than 113 km (70 miles) must either comply with height and power restrictions listed in a table included in the Rule or secure a waiver. The rule requires that applicants serve a copy of the waiver request on all co-channel licensees within the applicable area and permit co-channel licensees an opportunity to oppose the waiver.

[2] Short Spacing Report and Order, 8 FCC Rcd at 7296. We did, however, change the criteria for granting waivers of 47 C.F.R. § 90.621(b) from 40 dBu /30 dBu to 40 dBu /22 dBu, but did not provide for retroactive application of the new criteria. *Id.* at 7294.

9. U.S. Sugar had the burden of demonstrating that Susan Jacobs Design's engineering analysis based on the Commission's standard propagation model was flawed and that the 40 dBu/30 dBu predicted contours overlapped. U.S. Sugar failed to meet this heavy burden. It was not sufficient to allege that the R6602 curve model is not accurate in flat terrain and provide an alternative Longley-Rice analysis. Further, the analysis supplied by U.S. Sugar lacked sufficient explanation for the assumptions used and at points inconsistently applied these assumptions.

10. The engineering analysis proffered by Susan Jacobs Design showing 40 dBu/22 dBu protection is sufficient to support a waiver of Rule § 90.621(b). This showing meets even the more stringent revised criteria for protecting co-channel licensees, though we review the appropriateness of this grant by the existent standards as of the time this license was granted.

11. IT IS ORDERED THAT for the reasons discussed above, the Application For Review filed by U.S. Sugar Corporation in the above referenced matter IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

BTMI, INC., File Nos. BAL-920921HM
RECEIVER (Assignor)

and and

ASSOCIATED WOMP, BALH-920921HN
INC. (Assignee)

For Consent to the Assignment of
Licenses of Stations WOMP-AM-FM
Bellaire, Ohio

MEMORANDUM OPINION AND ORDER

Adopted: May 27, 1994; Released: June 24, 1994

By the Commission: Commissioners Ness and Chong not participating.

1. The Commission has under consideration the application for review filed on January 13, 1993 by McGraw Broadcasting Corporation ("McGraw"), licensee of Stations WEIR(AM), Weirton, West Virginia, and WWYS(FM), Cadiz, Ohio. McGraw seeks review of the action of the Mass Media Bureau denying its petition to deny and granting the above-captioned applications for Commission consent to the assignment of licenses of Stations WOMP-AM-FM, Bellaire, Ohio, from assignor BTMI, Inc., Receiver, to assignee Associated WOMP, Inc. ("Associated"). *See WOMP(AM)/WOMP-FM*, 8 FCC Rcd 495 (MM Bur. 1993).[1] We deny the application for review for the reasons set forth below.

2. The assignee is a wholly-owned subsidiary of Associated Communications Corporation, as is WSTV, Inc., the licensee of Stations WSTV(AM) and WRKY(FM), Steubenville, Ohio. Because the principal community (3.16 mV/m) contours of WOMP-FM and WRKY(FM) overlap, the assignee must comply with the revised radio contour overlap rule, Section 73.3555(a). *See Revision of Radio Rules and Policies*, Report and Order in MM Docket No. 91-140, 7 FCC Rcd 2755 (1992), *recon. granted in part and denied in part*, 7 FCC Rcd 6387 (1992) (*"Memorandum Opinion and Order"*). The stations would serve an area already served by at least fifteen commercial radio stations.

3. If the combined audience share of the stations that Associated (together with its parent corporation) proposes to co-own is no greater than 25%, then the proposed combination of 2 AM and 2 FM stations in the same market does not raise concerns of excessive local concentration of control. On the other hand, if the combined audience share exceeds 25%, then there is a *prima facie* concern that the proposed transaction will lead to excessive local concentration. *See* 47 C.F.R. § 73.3555 (a) (1) (ii); *Memorandum Opinion and Order*, 7 FCC Rcd at 6393, 6397. Pursuant to the rule, a station's audience share is defined as: the average number of [listeners] to AM and FM stations in that radio metro market or a recognized equivalent, *in which a majority of the overlap between the stations in question takes place*. . . . In situations where no metro market or recognized equivalent exists, the relevant audience share data is the data for all counties that are within the principal community contours of the stations in question, in whole or in part. 47 C.F.R. § 73.3555(a)(3)(iii) (1992) (emphasis added); *Memorandum Opinion and Order*, 7 FCC Rcd at 6406.

4. It is undisputed that, with respect to the overlap area, 41.2% of it lies within the Steubenville-Weirton metro market, 33.6% lies within the Wheeling metro market, and the remaining 25.2% does not lie within any metro market. The combined audience share of the four commonly-owned stations is 28.6% in the Steubenville-Weirton metro market and 16.8% in the Wheeling metro market. There are fourteen counties in the area comprising the relevant radio markets, and the combined audience share as weighted by population for these counties is 11.1%. *See Memorandum Opinion and Order*, 7 FCC Rcd at 6398-6399, n.73. Based on the latter figure, the Bureau found that the proposed combination of commonly-owned stations complies with Section 73.3555(a). Therefore, the Bureau denied McGraw's petition to deny and granted the applications for consent to the assignment of the licenses for WOMP-AM-FM to Associated.

5. In its application for review, McGraw argues that the grant of the assignment applications should be reversed because the proposed combination will result "in excessive market concentration" in the Steubenville-Weirton metro market, which McGraw insists is the relevant market. Although McGraw concedes that there is no singular metro market which comprises at least 50% of the overlap area, it stresses that the Steubenville-Weirton market comprises a plurality of the overlap area and that a substantial majority (74.8%) of the overlap occurs within the combined Steubenville-Weirton and the adjacent Wheeling metro markets. McGraw concludes that the use of weighted county data has "skew[ed] the outcome in a totally misleading fashion," resulting in a combined audience share of only 11.1%.

6. First, we observe that the Bureau read the terms of revised Section 73.3555(a) as calling for the application of metro market data only where a majority of the overlap occurs in a single metro market. In adopting this rule we stated:

> We will continue, with the exceptions described below, to calculate audience share based on [Arbitron] metro market data where such data are available. . . .

[1] Associated filed an opposition, and McGraw replied. In addition, on January 27, 1993, the Commission received a pleading, styled as an "Application for Review," filed by John A. Rees. Rees seeks review of the Bureau's ruling in *WOMP*, which also dismissed as moot his informal objection lodged against the instant assignment applications. However, Rees' pleading was not submitted to the Secretary of the Commission and was not served upon the parties-applicant, as required by 47 C.F.R. § 1.115(f)(1). We will therefore dismiss this pleading as procedurally defective. Nevertheless, we note that the substance of the pleading replicates arguments which are set forth in McGraw's application for review and which are addressed below.

> [because] it should generally reflect the relevant competitive market involved. We will require the use of either audience data for the metro market if the contours of both stations at issue are mainly located within a *single metro market*, or audience data for the counties covered in whole or in part by the principal community contours of the stations at issue. The relevant audience share figures in such cases will include audience statistics either for the metro market or from each county encompassed all or in part by the area covered by the principal community contours of the stations proposing to merge.

Memorandum Opinion and Order, 7 FCC Rcd at 6398 (emphasis added; footnotes omitted). Thus, the Bureau applied weighted county data, which indisputably results in the 11.1% figure for combined audience share.

7. Nevertheless, we note McGraw's concern that, in revising Section 73.3555, we did not specifically address the situation here, in which the majority of the overlap area falls within two or more metro markets, but no single metro market contains a majority of the overlap. In this situation, the Bureau's use of county-by-county data may not have sufficiently addressed whether excessive market concentration will occur. For the following reasons, we believe that a more accurate result is achieved by computing a weighted audience share for the metro markets covering the overlap area.

8. In adopting the revised contour overlap rule, we relied on the marketplace reality that radio stations primarily compete for audience and for advertising revenues within their principal community contour, wherein the majority of the population of their service area typically resides. Therefore, we defined the relevant markets for analysis in terms of engineering data (station contours) instead of ratings-service (*e.g.*, Arbitron) defined markets. *See Memorandum Opinion and Order*, 7 FCC Rcd at 6398. Markets defined in this manner generally reflect both the actual competitive situation facing stations and the diversity of radio voices available to their listeners. We also found that where the majority of the overlap area falls within a single "metro market," as defined by Arbitron or similar survey organization, the best readily available measure for purposes of safeguarding diversity through an audience share cap is the combined audience share in that metro market of the proposed commonly-owned stations. Likewise, where no "metro market" or recognized equivalent exists, we found that an average of county-by-county audience share data weighted by the population of each county was the best readily available measure. *Id.*; *see also* 47 C.F.R. § 73.3555(a)(3)(iii) (1992). However, the *Memorandum Opinion and Order* did not specifically address the situation where a majority of the overlap area falls within two or more metro markets but not within any single metro market. As a consequence, the literal wording of the pertinent provision of the revised contour overlap rule, Section 73.3555(a)(3)(iii), is ambiguous in such circumstances. Specifically, in defining "audience share," that subsection addresses only those situations either where there is a single radio metro market in which a majority of the overlap between the stations takes place or where no metro market exists. *See supra* ¶ 3 (excerpt of rule).

9. It was our intention to use metro audience share data where metro areas comprise a majority (*i.e.*, greater than 50%) of the overlap area. However, in the situation at hand, where more than one metro area exists, we believe that the best measure for purposes of identifying concentration problems through a combined audience share measure, from readily available sources, is a weighted average of the combined audience shares of the proposed commonly-owned stations over all metro markets in the overlap area. Application of this measure will avoid the distortion that could occur either from treating a single metro market as representative of the entire competitive situation or from ignoring the largely metropolitan focus of the competition by relying on county data instead of metro market data.

10. Here, we note that the Bureau considered the fact that 74.8% of the overlap area lies within the abutting Steubenville-Weirton and Wheeling metro markets and verified the applicants' alternative calculation of a weighted audience share (22.4%) for those metro markets. *WOMP*, 8 FCC Rcd at 496.[2] Because this weighted metro market audience share figure is less than 25%,[3] we affirm the Bureau's conclusion that no excessive local concentration of control will result from grant of the WOMP-AM-FM assignment applications.[4]

11. One other matter warrants brief comment. In its application for review, McGraw argues that the Bureau erred in granting the assignment applications because investment adviser Mario J. Gabelli has an attributable ownership interest in the assignee's parent, Associated Communications Corporation. As the Bureau noted, on August 21, 1992, the Commission simultaneously released

---

[2] Using data from the Spring, 1992 Arbitron report, the applicant states that the Steubenville-Weirton metro market contains the following three counties: Jefferson, Ohio (population 66,800); Brooke, West Virginia (pop. 22,700); and Hancock, West Virginia (pop. 29,800). Adding the population figures for these three counties, the applicant computes the total population of the Steubenville-Weirton metro market to be 119,300. Similarly, the Wheeling metro market, which contains the three counties of Belmont, Ohio (pop. 58,900), Marshall, West Virginia (pop. 31,000), and Ohio, West Virginia (pop. 42,400), has a total population of 132,300. Therefore, the combined population of the two metro markets is: 119,300 + 132,300 = 251,600. The percentage of the combined population which resides in the Steubenville-Weirton metro market is: (119,300 divided by 251,600) X 100 = 47.4%. The remaining 52.6% resides in the Wheeling metro market. Given that Steubenville-Weirton has an audience share of 28.6% and Wheeling has a 16.8% share, the weighted share for the combined metro markets is computed as: (28.6% X .474) + (16.8% X .526) = 13.6% + 8.8% = 22.4%. *See* Letter from Counsel for Applicants, dated October 5, 1992, at 3. *See generally Memorandum Opinion and Order*, 7 FCC Rcd at 6398-6399 n.73.

[3] The Bureau correctly noted that McGraw's suggestion that the audience share for the Steubenville-Weirton metro market (28.6%) should simply be added to the corresponding share for the Wheeling market (16.8%) -- to produce a sum of 45.4%, which substantially exceeds the 25% benchmark -- has no sound basis in statistics or logic. Also, given our decision here, we need not address McGraw's contention that the Bureau exceeded its delegated authority in deciding this case.

[4] If the weighted metro market audience share had exceeded 25%, we would be concerned that the proposed transaction would cause undue local concentration.

two orders pertinent to Mr. Gabelli and Gabelli Funds, Inc. regarding their compliance with the multiple ownership rules (47 C.F.R. §§ 73.3555 and 76.501(a)). *Order to Show Cause*, MM Docket No. 92-201, 7 FCC Rcd 5594 (1992). Although that order noted that Gabelli held an attributable 5.59% ownership interest in Associated Communications Corporation, our principal focus of concern was Gabelli's myriad interests in television stations, cable television companies, and newspapers. Nevertheless, on the same date, we granted an application for consent to transfer control of the licensee of Station WWOR-TV, Secaucus, New Jersey, to BHC Communications, Inc., a subsidiary of a company in which Mr. Gabelli was a cognizable shareholder. *Pinelands, Inc.*, 7 FCC Rcd 6058 (1992), *appeal dismissed sub nom. Garden State Broadcasting Limited Partnership v. FCC*, No. 91-1043 (D.C. Cir. June 29, 1993). In that case, we explained that use of a bifurcated process to sever our evaluation of the transfer application from our investigation into whether Gabelli's investment interests violated our rules would both protect the innocent shareholders who had not created the problem and best serve the public interest. *Id.* at 6067 (citing *Corporate Ownership Reporting and Disclosure by Broadcast Licensees*, 97 FCC 2d 997, 1033 (1984), *recon. granted*, 58 RR 2d 604 (1985), *further recon.*, 1 FCC Rcd 802 (1986)). For these same reasons, the bifurcation of the Gabelli matter from consideration of the WOMP-AM-FM assignment applications is likewise appropriate.[5]

12. IT IS ORDERED, That the "Application for Review" which was filed by John A. Rees, and which was received by the Commission on January 27, 1993, IS DISMISSED, and the application for review filed on January 13, 1993 by McGraw Broadcasting Corporation IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

[5] We note that the presiding Administrative Law Judge has approved a "Memorandum of Understanding" terminating the Gabelli investigation. *Mario J. Gabelli*, FCC 92M-1067, released December 4, 1992. Pursuant to the Memorandum of Understanding, Mr. Gabelli and Gabelli Funds, Inc. acknowledged that "the relevant voting interests which they now or from time to time may hereafter hold are subject to" Sections 73.3555 and 76.501, and they agreed to come into and remain in compliance with the multiple ownership rules within eight months of the finality of the ALJ's ruling. *Id.* at paragraph 5 & Attachment ("Memorandum of Understanding") at 4.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

EADS BROADCASTING CORPORATION
Assignor

File No. BAPH-921216GJ

and

C & C BROADCASTING, INC.
Assignee

For Assignment of License
of KGAL(FM)
Brownsville, Oregon

EADS BROADCASTING CORPORATION

File No. BPH-930222IG

For Modification of the
License and Construction
Permit of KGAL(FM)
Brownsville, Oregon

MEMORANDUM OPINION AND ORDER

Adopted: May 27, 1994; Released: June 24, 1994

By the Commission:

1. The Commission has before it for consideration the above-captioned applications for consent to assign the license and construction permit of KGAL(FM), Brownsville, Oregon, from Eads Broadcasting Corporation ("Eads") to C & C Broadcasting, Inc. ("C & C") and to modify the facilities of KGAL(FM). Petitions to deny the assignment application were filed on January 26, 1993, by McCoy Broadcasting Company ("McCoy"), licensee of KPNW(AM)/KPNW-FM, Eugene, Oregon, and on January 28, 1993, by McKenzie River Broadcasting Company, Inc., licensee of KMGE(FM), KKXO(AM) and KEED(AM), Eugene, Oregon ("McKenzie"). C & C filed a consolidated opposition to these petitions on February 12, 1993, to which McKenzie replied on February 25, 1993. The application to modify the station's facilities is unopposed.

2. C & C is presently the licensee of KUGN(AM)/KUGN-FM, an AM/FM combination in Eugene, Oregon. C & C proposes to acquire KGAL(FM), an authorized Class A FM station in Brownsville, Oregon. The principal community contours of KUGN(FM) and KGAL(FM) overlap; therefore, pursuant to 47 C.F.R. § 73.3555(a), C & C submitted an exhibit to demonstrate that its proposed co-ownership of the Eugene AM/FM combination and KGAL(FM) is permissible under the multiple ownership rules. Specifically, C & C submitted an exhibit to demonstrate that the city-grade signals of 26 commercial radio stations overlap or intersect the area encompassed by the principal community contours of the mutually overlapping stations which C & C proposes to co-own. C & C also provided audience share data to demonstrate that its proposed acquisition of KGAL(FM) would not result in excessive concentration. In this regard, C & C asserted that the majority of the area of overlap between the stations in question is outside the Eugene Arbitron metro market, which includes only Lane County, Oregon. Accordingly, C & C submitted audience data derived from the 1992 Arbitron Radio County Coverage survey to demonstrate that the combined audience share for the proposed combination is 17.4 percent.

3. McKenzie, in its petition to deny, contends that the application cannot be granted without a hearing. Specifically, McKenzie points out that the proposed transaction is contingent on the grant of a pending application to upgrade KGAL(FM) to a Class C1 facility, to be co-located with KUGN(FM). Thus, McKenzie and McCoy both assert that the relevant market for purposes of the audience share analysis is the Eugene metro market, since the majority of the area of overlap between the stations in question will occur in the metro market when KGAL(FM)'s proposed Class C1 facilities are considered. In this regard, McKenzie and McCoy also argue that KUGN(AM)/KUGN-FM already dominate the Eugene metro market, based on a combined audience share of 25.8 percent in the Fall 1992 Arbitron survey. McCoy further asserts that KUGN(AM)/KUGN-FM already receive the largest share of the advertising revenue in the Eugene market. Moreover, McKenzie maintains that after KGAL(FM) receives a construction permit to upgrade its facilities, its zero share in the Eugene metro market will increase substantially, and thus the proposed combination will result in excessive concentration. McKenzie submits that these circumstances are sufficient to demonstrate that grant of the subject application is *prima facie* inconsistent with the public interest.

4. *Procedural Matters.* C & C asserts that McKenzie and McCoy lack standing to petition to deny this assignment because neither McKenzie nor McCoy has demonstrated its status as a party-in-interest and because neither petition is supported by the affidavit required by 47 U.S.C. § 309(d)(1). As discussed below, the Eugene market will be implicated in the multiple ownership analysis of the assignment at issue here, and thus McKenzie and McCoy as competitors of KUGN(AM)/KUGN-FM in Eugene are parties-in-interest pursuant to 47 U.S.C. § 309. *See FCC v. Sanders Brothers Radio Station*, 309 U.S. 257 (1940). However, we agree with C & C that McCoy's petition is not accompanied by an affidavit supporting the allegations made therein, as required by Section 309(d)(1). Therefore, McCoy's petition will be treated as an informal objection pursuant to 47 C.F.R. § 73.3587. McKenzie's petition includes the requisite affidavit; however C & C asserts that the affidavit was executed before the petition was signed, and therefore is ineffective support for the truth of the statements of fact contained in the petition. In its reply, McKenzie contends that although the affidavit was executed prior to the time that the petition was signed, the affiant had indeed read the petition in its final form before it was filed. Moreover, the reply contains a separate affidavit reaffirming the accuracy of the facts contained in the petition. Under these circumstances, we find that McKenzie's petition meets the procedural prerequisites of Section

309(d)(1). *See Finer Living, Inc.*, 5 FCC 2d 984, 987 (1966). *See also Malrite of New York, Inc.*, 71 FCC 2d 241, 243 (1979).[1]

5. In MM Docket No. 91-140, the Commission relaxed the local radio ownership rules. *See Revision of Radio Rules and Policies*, 7 FCC Rcd 2755 (1992) (*"Report and Order"*); *recon. granted in part, denied in part*, 7 FCC Rcd 6387 (1992) (*"Memorandum Opinion and Order"*). Like the prior rules, the revised rules apply only if there is overlap of commonly owned stations in the same service. In this case there is such overlap between stations KUGN(FM) and KGAL(FM). [This is true regardless of whether KGAL operates with its present facilities or with the upgraded facilities proposed in its pending modification application.] However, while the old rules flatly prohibited such overlap, the new rules allow ownership of stations with otherwise prohibited overlap if certain additional requirements are met. These requirements differ based on the numver of stations in the market. In markets with 15 or more stations, common ownership of up to 2 AM and 2 FM stations is permissible, provided that the proposed combination will not result in excessive concentration, which is presumed when the combined audience share of the proposed co-owned stations exceeds 25 percent. *See* 47 C.F.R. § 73.3555(a)(1)(ii); *Memorandum Opinion and Order*, 7 FCC Rcd at 6393, 6396-6400. Audience share will be determined using the most recent published audience share survey data available at the time that the application is filed, and alternative data may be submitted to demonstrate that the transaction will not result in excessive concentration.[2] *See Franklin Communications Partners, L.P.*, 8 FCC Rcd 4909 (1993); *Report and Order*, 7 FCC Rcd at 2780; *Memorandum Opinion and Order*, 7 FCC Rcd at 6396-6400. For markets with fewer than 15 stations, the common ownership of up to three radio stations is permitted, provided that no more than two stations are in the same service and provided that the commonly owned stations represent less than 50 percent of the total number of stations in the market. *See* 47 C.F.R. § 73.3555(a)(1)(i).

6. The method of calculating both the number of stations in the market and the audience share relies on the principal community contours of the stations in question. However, the rules do not directly address how either a construction permit that has been granted or an authroized facility of a proposed co-owned station is affected by the rules when the the principal community contour of the station will change as a result of the modification. Consequently, we will interpret our rules to require a two-step analysis. First, the number of stations in the market, and if applicable, the audience share limit, will be evaluated based on the faciltiies of the stations to be co-owned as they are presently licensed or authorized.

7. If the proposal set forth in the assignment or transfer application complies with the rules based on the presently authorized facilities of the proposed co-owned stations in step one, we will proceed to the second step of the analysis. The transaction will be evaluated again, substituting any relevant proposed or authorized modified facilities for the facilities which are presently licensed or authorized. In this regard, we note that it is Commission policy to grant construction permits only to qualified applicants who have a *bona fide* intention to construct the facilities they propose. *See Community Service Broadcasting, Inc.*, 7 FCC Rcd 5652, 5654 (1992), *recon. denied* 8 FCC Rcd 5044 (1993) *citing Calhoun County Broadcasting Co.*, 57 RR 2d 641, 646 (1985). We therefore believe that it is appropriate also to evaluate a proposal on the basis of any modifications to the facilities of the proposed co-owned stations, whether those modifications have been granted or are the subject of a pending application for a modification of the license or construction permit of the stations at issue.[3] Consequently, before acting on an assignment or transfer application, we will need to evaluate any proposed or granted modification of the facilities of any station relevant to the transaction under the multiple ownership rules. In this regard, we will ask applicants for the following information if it is not in the application: two exhibits, to demonstrate that both the presently operating facilities, as well as the facilities with the proposed modifications, will comply with the local ownership rules. *See* 47 C.F.R. § 73.3555(a)(1); *Report and Order*, 7 FCC Rcd at 2779 n.102. Furthermore, applicants have the obligation, pursuant to 47 C.F.R. § 1.65, to update any pending application to report the filing of an application to modify the facilities of a proposed co-owned station and to provide any appropriate amendments to exhibits required under the multiple ownership rules or otherwise submitted prior to, or in response to, a staff request.

8. Thus, the second step will require a separate determination of the relevant market. The market will be defined by the area encompassed by the principal community contours of the stations to be co-owned, using the principal community contours associated with the modification of the facilities of any of the stations at issue. Further, if the relevant market has 15 or more stations, the geographic area to be used in the audience share analysis will be determined based on the modified facilities. If the majority of the area of overlap between the facilities at issue lies in a metro market, the relevant Arbitron data for that metro market will be considered. If the majority of this area of overlap is not within a metro market, audience share data for each county covered in whole or in part by the principal community contours of the stations at issue will be considered. *See Memorandum Opinion and Order*, 7 FCC Rcd at 6398-99, n.73. In order to be approved, the transaction must satisfy both parts of the two-step analysis. In this

---

[1] We conclude that C & C's cursory allegations concerning McKenzie's anti-competitive motive for challenging the subject assignment application fail to demonstrate that McKenzie's petition to deny is a strike pleading. *See Radio Carrollton*, 69 FCC 2d 1139, 1150-51 (1978), *clarified*, 69 FCC 2d 424 (1978), *recon. denied*, 72 FCC 2d 264 (1979), *aff'd sub nom Fau lkner Radio, Inc. v. FCC*, No. 79-1749 (D.C. Cir. Oct. 15, 1980), *cert. denied*, 450 U.S. 1041 (1981).

[2] The use of metro or county Arbitron data for calculating audience share in the first step of the analysis will continue to be governed by whether a majority of the area of overlap of the principal community contours of the stations in question lies in the metro market. *See* 47 C.F.R. § 73.3555(a)(3)(ii).

[3] C & C states that on the basis of a pre-filing submission which included disclosure of the required modification of KGAL(FM), the staff of the Mass Media Bureau advised C & C that the transaction would be evaluated based only on the existing facilities of the stations to be co-owned. However, an informal staff opinion is not binding on the Commission. *See Malkan FM Associates v. FCC*, 935 F.2d 1313, 1319 (D.C. Cir. 1991); *Amor Family Broadcasting Group v. FCC*, 918 F.2d 960, 962 (D.C. Cir. 1990).

regard, we note that upon approval of the proposed transaction, the station subject to modification may continue to operate with its existing facilities while the modification of the facilities is completed. Moreover, for a variety of reasons, some proposed and approved modifications are never implemented. Consequently, it is appropriate that the transaction be reviewed for compliance with the rules considering both the existing facilities, as well as the modified facilities, of the proposed co-owned stations.

9. Applying the two-step analysis outlined above to the transaction proposed here, we find that grant of C & C's application is appropriate. KGAL(FM) is presently authorized as a Class A station. The area encompassed by the principal community contours of KUGN(AM)/KUGN-FM and KGAL(FM)'s Class A facilities, has more than 15 commercial radio stations. The area of overlap between the principal community contours of the present facilities of the stations at issue occurs only in Linn county, which is outside of the Eugene Arbitron metro market. The combined audience share of the stations to be co-owned in counties covered in whole or in part by the principal community contours of the stations at issue, weighted based upon the population of those counties, is 12.1 percent.[4] The county data is derived from the Arbitron 1992 Edition Radio County Reports, the most recent published Arbitron data available at the time that the application was filed. The combined audience share of the present facilities proposed to be co-owned is not more than 25 percent. Thus, when those facilities are considered, the transaction will not raise a *prima facie* case of excessive concentration, and the transaction passes the first step of the analysis.

10. The second step of the analysis requires the evaluation of the proposed combination in light of the application for the modification of the facilities of KGAL(FM).[5] There are more than 15 commercial stations in the area encompassed by the principal community contours of KUGN(AM)/KUGN-FM and the principal community contour for KGAL(FM)'s proposed Class C1 facilities. However, the majority of the area of overlap between the relevant principal community contours of the stations, including KGAL(FM), as modified, will occur in the Eugene metro market.[6] We reject McKenzie's argument that the Fall 1992 Arbitron ratings must be used to calculate the audience share for KUGN(AM)/KUGN-FM in the Eugene metro market. Audience share is calculated based on the most recent audience share data available at the time that the application is filed. *See Franklin Communications Partners, L.P.*, 8 FCC Rcd 4909 (1993). The Spring 1992 Arbitron ratings were the most recent audience share data available at the time that the application was filed since the Fall 1992 Arbitron survey was not then published. The combined audience share for KUGN(AM)/KUGN-FM and KGAL(FM) using the Spring 1992 data is 25 percent.[7] Consistent with the approach set forth above, the audience share was calculated using record evidence of the Arbitron Spring 1992 ratings for KGAL(FM) in the Eugene metro market with its present Class A facilities.[8] Thus, the second step of the two-step analysis also reveals that the transaction will not raise a *prima facie* case of excessive concentration. Because the transaction satisfies both parts of the two-step analysis, we need not consider the other evidence submitted by McKenzie and McCoy concerning concentration in the Eugene metro market. *See Memorandum Opinion and Order*, 7 FCC Rcd at 6397, 6399, n.77; *Patteson Brothers Inc.*, 8 FCC Rcd 7595, 7596 (1993) (consideration of alternative showings requires a demonstrated anomaly in the audience share data). The application to modify the facilities of KGAL(FM) otherwise complies with our rules. Because both the assignment application and the pending modification application are acceptable and the parties are otherwise qualified, we will grant both applications herein.

11. In view of the foregoing, IT IS ORDERED, That the application for consent to assign the license of KGAL(FM), Brownsville, Oregon, from Eads Broadcasting Corporation to C & C Broadcasting, Inc., File No. BAPH-921216GJ, IS HEREBY GRANTED. IT IS FURTHER ORDERED, That the petition to deny filed January 28, 1993 by McKenzie River Broadcasting Company, Inc. and the petition to deny filed January 26, 1993 by McCoy Broadcasting Company, when treated as an informal objection pursuant to 47 C.F.R. § 73.3587, ARE HEREBY DENIED. IT IS FURTHER ORDERED, That the application to modify the

---

[4] The counties are Lane, Linn, Benton and Douglas. C & C obtained a 17.4 percent audience share because its calculation did not include data for Benton and Douglas counties.

[5] We note that the contract supporting the subject assignment application is expressly contingent on the grant of a construction permit to modify KGAL(FM)'s presently authorized facilities by upgrading to a Class C1 and relocating the KGAL(FM) tower at the KUGN(FM) site. McKenzie asserts that the contingent nature of the sale transaction should have been disclosed when the application was filed because C & C and Eads had agreed to this contingency prior to filing. On January 12, 1993, after the decision granting the allotment for the upgrade of KGAL(FM)'s facilities became final, the parties amended the application to submit an executed agreement of sale supporting the transaction which states that the sale of KGAL(FM) is contingent upon grant of the application to modify the facilities of KGAL(FM), BPH-920222IG. Although McKenzie asserts that the contingency and the modification should have been disclosed when the assignment application was filed, under the circumstances presented here, McKenzie has not raised a substantial and material question of fact as to misrepresentation or lack of candor which would require further inquiry. *See Astroline Communications Company*, 857 F.2d 1556 (D.C. Cir. 1988); *Scott and Davis Enterprises, Inc.*, 88 FCC 2d 1090, 1099 (Rev. Bd. 1982).

[6] In this regard, we note that a staff engineering study reveals that the relevant principal community contour for KGAL(FM)'s proposed Class C1 facilities is approximately the same as the principal community contour of KUGN-FM; therefore, we can ascertain that that there are more than 15 commercial stations in the relevant market and that the majority of the area of overlap is within the Eugene metro market from the exhibit provided by C & C.

[7] The 25 percent audience share is calculated by adding the following shares for the individual stations: KUGN(AM) -- 7.8 percent, KUGN-FM -- 17.2 percent, KGAL-FM -- 0 percent.

[8] Although McKenzie argues that it is unrealistic to evaluate audience share based on the rating received by KGAL(FM) as presently authorized in the Eugene metro market, we reject McKenzie's suggestion that KGAL(FM) should be assigned a rating comparable to the audience share of other Class C FM stations in the Eugene metro market which broadcast from locations near the proposed KGAL(FM) site, since to do so would require assumptions that are little more than pure speculation. This is particularly true given that it is audience share, not signal availability, that would be predicted by McKenzie's approach, and audience share is plainly sensitive to may factors beyond the physical facilities of the licensee.

facilities of KGAL(FM) to Class C1 and to relocate the transmitter for those facilities. File No. BPH-930222IG. IS HEREBY GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

GN Docket No. 93-252

In the Matter of

Implementation of Sections 3(n) and 332 of the Communications Act

Regulatory Treatment of Mobile Services

FURTHER NOTICE OF PROPOSED RULE MAKING

Adopted: April 20, 1994; Released: May 20, 1994

Comment Date: June 20, 1994
Reply Comment Date: July 11, 1994

By the Commission:

TABLE OF CONTENTS

	Paragraph
I. INTRODUCTION	1-2
II. BACKGROUND	3-4
III. DISCUSSION	
A. Scope of Transitional Rule Making	5-9
B. Comparison of Reclassified Part 90 Services and "Substantially Similar" Common Carrier Services	10-14
1. Specialized Mobile Radio	15-16
2. 220-222 MHz Service	17
3. Business Radio	18
4. Paging	19
C. Technical and Operational Rules	20-24
1. Technical Rules	25
a. Channel Assignment and Service Area	
1) Background	26-28
2) Discussion	
i. SMR	29-34
ii. Other Part 90 Services	35-38
b. Co-Channel Interference Protection	39-41
c. Emission Masks	42-44
d. Antenna Height and Power Limits	45-53
e. Modulation and Emission Requirements	54-55
f. Interoperability	56-57
2. Operational Rules	58
a. Construction Period and Coverage Requirements	59-66
b. Loading Requirements	67-73
c. User Eligibility	74-75
d. Permissible Uses	76-79
e. Station Identification	80-82
f. General Licensee Obligations	83
g. Equal Employment Opportunities	84-85
D. CMRS Spectrum Aggregation Limit	86-91
1. General Spectrum Cap Alternatives	92-98
2. Application of Spectrum Cap	
a. Geographic Areas	99-100
b. Attribution Standards	
1) Ownership Percentage	101
2) Service Area Overlap	102
c. Designated Entities	103
3. Other Issues	104-105
E. Licensing Rules and Procedures	106-107
1. Application Forms and Procedures	108-112
2. Qualifying Information	113-114
3. Application Fees	115
4. Regulatory Fees	116
5. Public Notice and Petition to Deny Procedures for CMRS Applications	117-118
6. Mutually Exclusive Applications	119-128
7. Amendment of Applications and License Modification	129-134
8. Conditional and Special Temporary Authority	135-138
9. License Term/Renewal Expectancy	139-140
10. Assignment of Licenses and Transfer of Control	141-146
11. Licensing of Combined CMRS and PMRS Services	147-148
12. Conversion to CMRS Status by Existing Part 90 Licensees	149-151
IV. PROCEDURAL MATTERS	152-155
APPENDICES	
A. Proposed Mobile Services Application Form and Schedules	
B. Initial Regulatory Flexibility Analysis	

I. INTRODUCTION

1. On February 3, 1994, we adopted a Second Report and Order[1] in this proceeding that implemented the basic provisions of Sections 3(n) and 332 of the Communications Act (the Act), as amended by Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993.[2] The new regulatory structure established by the *Second Report and Order* was designed to ensure symmetrical regulatory treatment of competing mobile service providers, to promote further competition and economic growth in the mobile services marketplace, and to establish an appropriate level of regulation to protect mobile service consumers.

2. Today's Further Notice proposes further modifications to our existing mobile services rules that are necessary to complete the transition to the new regulatory regime envisioned by Congress and establish regulatory symmetry in the regulation of mobile services. Specifically, we address the impact of the amended statute on technical, operational, and licensing rules for the mobile services, and particularly on the rules affecting those former private land mobile services that have been reclassified as "commercial mobile" radio services (CMRS) by the *Second Report and Order*. As required by the Budget Act, we propose to amend these rules to ensure that competitors in the mobile services marketplace are subject to comparable regulatory requirements and that inconsistencies in our regulation of substantially similar services are eliminated. We seek comment on these proposed changes, and will act on our proposals by the August 10, 1994 deadline established by Congress for adoption of rules implementing the statute.[3]

II. BACKGROUND

3. In the Second Report and Order, we applied the statutory definitions of "commercial mobile" radio service (CMRS) and "private mobile" radio service (PMRS) to determine the regulatory status of all existing mobile services and of Personal Communications Services (PCS). We determined that all existing common carrier mobile services meet the statutory definition of CMRS set forth in Section 332(d) of the Act, *i.e.*, they are engaged in offering for-profit, interconnected service to the public or a substantial portion of the public.[4] We further determined that many existing private land mobile services regulated under Part 90 of our rules, such as government, public safety, and certain specialized industrial services, fall outside one or more elements of the CMRS definition and therefore should be classified as PMRS.[5] With respect to Specialized Mobile Radio (SMR), Business Radio, 220-222 MHz private land mobile service, and private paging, however, we determined that our private land mobile service rules allow (although they do not require) licensees in these four service categories to offer for-profit, interconnected service to the public or a substantial portion of the public, thus meeting the CMRS definition. We therefore concluded that licensees in these Part 90 service categories who are in fact providing such service would be reclassified as CMRS, while Part 90 licensees whose operations do not meet the CMRS definition would continue to be classified as private.[6]

4. Having identified those classes of private land mobile service licensees that would be reclassified as CMRS, we noted that the Budget Act sets forth a specific timetable for transition to the new regulatory structure.[7] First, the statute establishes a one-year period from the date of enactment, *i.e.*, until August 10, 1994, for us to make such changes to our existing service rules as are necessary to implement the amendments to Section 332 and to provide for an orderly transition. Specifically, the Budget Act states that the Commission:

> (A) shall issue such modifications or terminations of the regulations applicable . . . to private land mobile services as are necessary to implement the amendments made by [Budget Act] subsection (b)(2) [*i.e.*, revised Sections 3(n) and 332 of the Act]
>
> (B) in the regulations that will . . . apply to a service that was a private land mobile service and that becomes a commercial mobile service . . .. shall make such other modifications as may be necessary and practical to assure that licensees in such service are subjected to technical requirements that are comparable to the technical requirements that apply to licensees that are providers of substantially similar common carrier services;
>
> (C) shall issue such other regulations as are necessary to implement the amendments [to Section 3(n) and 332 of the Act]; and
>
> (D) shall include, in such regulations, modifications and terminations, such provisions as are necessary to provide for an orderly transition.[8]

Second, the statute provides that for three years from the date of enactment, i.e., until August 10, 1996, existing private land mobile licensees that are subject to reclassification as CMRS providers will continue to be regulated as private service providers.[9] In light of these transitional provisions in the statute, we decided in the *Second Report and Order* that it was prudent first to determine the classification of existing mobile services and to defer consideration of additional rule changes required in conjunction with implementing these classifications.[10]

---

[1] *Second Report and Order*, Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, GN Docket No. 93-252, 9 FCC Rcd 1411 (1994), *erratum*, Mimeo No. 92486 (released March 30, 1994) (*Second Report and Orderc*).

[2] Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, § 6002(b), 107 Stat. 312, 392 (1993) (Budget Act).

[3] *See* Budget Act, § 6002(d)(3).

[4] 47 U.S.C. § 332(d); *see Second Report and Order*, ¶ ¶ 100-109.

[5] *Second Report and Order*, ¶ ¶ 82-86.§

[6] *Id.* , ¶ ¶ 87-97.

[7] *Id.*, ¶ 278.

[8] Budget Act, § 6002(d)(3).

[9] *Id.*, § 6002(c)(2)(B). Although the described services will be treated as private mobile radio services for three years, the provisions of Section 332(c)(6) (foreign ownership) are immediately applicable to all reclassified licensees. *See First Report and Order*, GN Docket No. 93-252, 9 FCC Rcd 1056 (1994).

[10] *Second Report and Order*, ¶ ¶ 282, 285.

III. DISCUSSION

A. Scope of Transitional Rule Making

5. While the *Second Report and Order* has established the basic framework for classification of mobile services and the regulatory treatment of CMRS, the Budget Act requires us to address several additional statutory and regulatory issues in this proceeding. First, the statute directs the Commission to ensure that private land mobile licensees who are reclassified as CMRS providers are subject to technical requirements comparable to those that apply to providers of "substantially similar" common carrier services. Therefore, this Further Notice first addresses the issue of what is meant by "substantially similar" services for this purpose. Because one of the principal goals of the Budget Act is regulatory parity within product markets and geographic markets for services that compete with each other, we propose to base the determination of substantial similarity primarily on whether the CMRS providers in question compete to meet similar customer demands for services. We further seek specific comment regarding the extent to which each reclassified Part 90 service can be viewed as competing against other CMRS offerings.

6. Next, we seek comment on how to ensure that our technical and operational rules for reclassified Part 90 licensees and carriers and other service providers offering substantially similar common carrier services are "comparable." We believe that Congress regarded achieving "comparable" regulation in these rules as essential to establishing regulatory symmetry and promoting fair competition among mobile service providers. We therefore propose to identify and eliminate those differences in our existing technical and operational rules that would otherwise result in inconsistent regulation of substantially similar CMRS services. In those instances where we believe that modification of our existing technical and operational rules is required, we generally seek comment on which of the following alternatives would best promote competition and ensure regulatory symmetry: (1) extension of the Part 22 rule to Part 90 CMRS services; (2) extension of the Part 90 rule to Part 22 services; or (3) modification of our rules in both Part 22 and Part 90.[11] In addition, because of the potential competitive impact of PCS on existing mobile services, we seek comment on the degree to which we should conform our technical and operational rules for existing mobile services with our technical and operational rules for PCS.[12]

7. In some instances, our proposals to amend technical and operational rules in this Further Notice reflect changes to Part 22 and/or Part 90 that have already been proposed in CC Docket No. 92-115, our proceeding to rewrite and simplify Part 22,[13] or in PR Docket No. 92-235, our "Refarming" proceeding, which proposes to replace Part 90 with simplified and reorganized rules in a new Part 88.[14] In addition, some of the changes we are proposing to our 800 and 900 MHz SMR rules are drawn from previous proposals made in our 800 MHz "Expanded Mobile Service Provider" (EMSP) docket (PR Docket 93-144)[15] and our 900 MHz "Phase II" proceeding (PR Docket 89- 553),[16] both of which deal with wide-area licensing of SMR systems. Although all of these dockets were initiated prior to the Budget Act, we believe that many of the pending proposals put forth in these proceedings may substantially advance the goals of the statute. As discussed in greater detail below, therefore, we incorporate relevant portions of the record from these prior dockets into this proceeding, and we specifically seek comment on the degree to which we should incorporate previously pending proposals for revision to Part 22 and Part 90 into our transitional rules.

8. Next, we address whether to adopt a cap on the amount of CMRS spectrum that licensees may aggregate in

---

[11] In general, we propose to incorporate the rule changes proposed herein that apply on a service-specific basis into our existing Part 90 and Part 22 rules rather than attempting a "merger" of the two rule parts. In addition, proposed rules that apply uniformly to all CMRS providers will be incorporated into the new Part 20 of our rules established by the *Second Report and Order*. While we do not propose to merge or otherwise reorganize our existing mobile services rules at this time, we do not rule out the possibility of such a reorganization at a later date.

[12] *See First Report and Order*, Amendment of the Commission's Rules to Establish New Personal Communications Services, GEN Docket No. 90-314, 8 FCC Rcd 7162 (1993) (*Narrowband PCS Order*), *recon.*, *Memorandum Opinion and Order*, 9 FCC Rcd 1309 (1994) (*Narrowband PCS Reconsideration Order*); *Second Report and Order*, 8 FCC Rcd 7700 (1993) (*Broadband PCS Order*), *recon. pending*. In considering whether to conform our existing service rules and our PCS rules, we intend to take into account any action taken in our pending reconsideration of the *Broadband PCS Order*.

[13] *Notice of Proposed Rule Making*, CC Docket No. 92-115, 7 FCC Rcd 3658 (1992) (*Part 22 Rewrite Notice*). In a separate action in Docket 92-115, we are proposing further revisions to Part 22 that would streamline licensing and other regulatory procedures for cellular service and 931-932 MHz paging service. *See Further Notice of Proposed Rule Making*, CC Docket No. 92-115, FCC No. 94-102 (adopted April 20, 1994; released May 20, 1994) (*Part 22 Further Notice*).

[14] *Notice of Proposed Rule Making*, PR Docket No. 92-235, 7 FCC Rcd 8105 (1992) (*Refarming Notice*). While we believe that the proposals in the *Refarming Notice* to simplify and streamline our Part 90 rules are both relevant to and generally consistent with the goals of this proceeding, it should be emphasized that we do not regard the enactment of Section 332 as having a significant bearing on our proposals in the *Refarming Notice* relating to rechannelization and other technical changes in private land mobile bands below 512 MHz. Under the *Second Report and Order*, most private land mobile services below 512 MHz will continue to be regulated entirely as PMRS, with the exception of commercial 220-222 MHz service, private carrier paging in the 150 and 450 MHz bands, and lower band Business Radio. Moreover, the *Refarming Notice* does not propose any rechannelization or other technical changes in the 220-222 MHz band or on lower band paging frequencies. Thus, the only CMRS licensees that would potentially be affected by rechannelization would be licensees of two-way Business Radio systems below 512 MHz that meet the CMRS definition. *See* ¶ 18, *infra*.

[15] *Notice of Proposed Rule Making*, Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, PR Docket No. 93-144, 8 FCC Rcd 3950 (1993) (*800 MHz EMSP Notice*).

[16] *First Report and Order and Further Notice of Proposed Rule Making*, Amendment of Parts 2 and 90 of the Commission's Rules to Provide for the Use of 200 Channels Outside the Designated Filing Areas in the 896-901 MHz and 935-940 MHz Band Allotted to the Specialized Mobile Radio Pool, PR Docket No. 89-553, 8 FCC Rcd 1469 (1993) (*900 MHz Phase II Notice*).

a given geographic area.[17] We seek comment on whether, as a result of our allocation of spectrum to PCS and the regulatory determinations made in the *Second Report and Order*, the potential exists for licensees to exert market power by aggregating CMRS spectrum. To ensure that the CMRS market is fully competitive, we seek comment on several alternatives for limiting the amount of CMRS spectrum that may be licensed to a single entity in a given geographic area.

9. Finally, we address the issue of licensing rules for CMRS applicants in those services that were formerly licensed solely on a private basis. Specifically, we propose to ensure that once reclassification becomes effective, all CMRS applications are subject to uniform licensing procedures that comply with the statutory requirements for licensing of common carriers under Title III of the Act, including public notice procedures and alien ownership restrictions. In addition, we propose a transition mechanism for carrying out the reclassification of existing private radio licensees that have been identified as CMRS providers by the *Second Report and Order* but that are not subject to CMRS regulation until the conclusion of the statutory transition period.

B. Comparison of Reclassified Part 90 Services and "Substantially Similar" Common Carrier Services

10. The Budget Act provides that in the case of a former private land mobile service that is reclassified as CMRS, the Commission must amend its rules "as may be necessary and practical to assure that licensees in such service are subjected to technical requirements that are comparable to the technical requirements that apply to licensees that are providers of substantially similar common carrier services."[18] The first step in this process is to define what is meant by "substantially similar" services for this purpose.

11. The *Second Report and Order* provides that licensees in the following Part 90 services will be classified as CMRS if they provide for-profit, interconnected service to the public or a substantial portion of the public: 800 and 900 MHz SMR (Part 90, Subpart S), including conventional, trunked, and wide-area systems;[19] private carrier paging in the 150 MHz, 450 MHz and 900 MHz bands (Part 90, Subparts D and P); Business Radio (Part 90, Subpart D);[20] and 220-222 MHz commercial two-way nationwide and local service (Part 90, Subpart T). Part 22 also governs a diverse array of commercial mobile services,[21] including cellular telephone service (Part 22, Subpart K), Offshore Radio Service (Part 22, Supbart L), 800 MHz air-ground service (Part 22, Subpart M), and Public Land Mobile Service (Part 22, Subpart G), which includes common carrier paging service, improved mobile telephone service (IMTS), and 454 MHz air-ground service.

12. Given the diversity of services in Part 90 and Part 22, we seek comment on how determinations of "substantial similarity" should be made, both generally and specifically with respect to each affected Part 90 service. In particular, commenters should focus on comparison between services currently regulated under Part 90 and Part 22, but we also ask commenters to address mobile services that are subject to common carriage regulation but are not covered by Part 22 (*e.g.*, mobile satellite services, public coast station services). We start with the assumption that a principal objective of Congress in revising Section 332 was to benefit consumers by promoting competition in the mobile services marketplace. Congress created CMRS as a new classification of mobile services to ensure that similar mobile services are accorded similar regulatory treatment.[22] Consistent with that objective, our role is to establish a regulatory regime under which the marketplace -- and not the regulatory arena -- shapes the development and delivery of mobile services to meet the demands and needs of consumers.[23] Reliance on market forces will ensure that the most efficient service providers prevail. This will create incentives for firms to offer innovative and improved services at the lowest possible costs, and will also ensure that investment decisions are driven by consumer demands rather than regulations.

13. To this end, we believe the analysis of whether services are "substantially similar" should focus primarily on the services provided to end users and the extent to which such services meet substantially similar customer needs and demands. Under this approach, services that compete against each other to provide similar services to customers would be presumed to be substantially similar for purposes of comparing their technical and operational rules. We believe that this approach is consistent with Congress' mandate in the Budget Act that similar services should be accorded similar regulatory treatment. Where

---

[17] We initially had not included a proposal for a CMRS spectrum aggregation limit in the Further Notice we adopted on April 20, 1994. On reconsideration on our own motion, we voted to adopt the proposal set forth in Section III.D., *infra*, on May 19, 1994. *See* 47 CFR § 1.108.

[18] Budget Act, § 6002(d)(3)(B).

[19] Conventional SMR systems operate on one to four channels with no trunking allowed, *i.e.*, users must scan each channel for available air time. Trunked SMR systems use blocks of five or more channels, with users automatically routed to an available channel. Our SMR rules contain no definition of "wide-area" SMR systems, but the term is frequently used in the SMR industry to refer to licensees who have accumulated multiple blocks of trunked channels covering a large area based on a showing of "aggregate loading." *See* ¶ ¶ 27, 29, *infra*. While the number of channels used by such licensees varies, the technology currently employed by most 800 MHz licensees seeking to build systems that employ frequency reuse requires a block of at least 42 channels in a given area to allow for efficient channel reuse. In the *800 MHz EMSP Notice*, we have proposed to use 42 channels as the standard number of unconstructed channels to be allocated to 800 MHz wide-area licensees, although SMR licensees with constructed systems would be allowed to increase their capacity above 42 channels by adding unconstructed channels to their already-constructed channels. *800 MHz EMSP Notice*, ¶ 19 & n.40. At 900 MHz, we have proposed to license 20-channel blocks on a nationwide and regional basis, with licensees allowed to aggregate up to 40 channels in some areas by combining nationwide and regional or local allocations. *900 MHz Phase II Notice*, ¶ ¶ 13-14.

[20] Subpart D regulates Business Radio systems on frequencies below 512 MHz, which are potentially subject to reclassification as CMRS because they may provide interconnected service on a for-profit as well as a not-for-profit basis. In addition, we have allocated frequencies in the 800 and 900 MHz bands for Business Radio use, regulated under Subpart S. Business Radio systems in these bands, however, are prohibited from selling service to customers for profit. 47 CFR § 90.179(g). Therefore, they are not subject to reclassification as CMRS.

[21] Part 22 also contains regulations for the Rural Radio service, which is a fixed service and therefore not subject to Section 332 of the Act.

[22] *See Second Report and Order*, ¶ 13 & n.29.

[23] *Id.*, ¶ 19.

two service providers offer similar services to customers in competition with each other, disparities in the technical and operational rules under which the respective services operate could provide one competitor with an unfair advantage over the other, which in turn could lead to the provision of service by an otherwise higher-cost or lower-quality provider. Thus, in order to determine whether to amend our technical and operational rules, we must first determine the competitive relationship between the services. We request comment on this analysis.

14. We also request comment on specific factors we should use under this approach to determine whether specific CMRS offerings are competitive with other CMRS services. For example, we could look at the way various CMRS services are marketed to customers, *i.e.*, whether service providers claim that their service is substitutable for a common carrier service. Another approach would be to examine whether customers are actually choosing between two services when deciding which mobile service to use. Finally, we could look at both the marketing strategies of CMRS providers as well as factors a customer considers when choosing a service. We invite commenters to address these examples, to suggest other possible relevant factors, and to provide specific comparisons between formerly private services that have been reclassified as CMRS and all existing common carrier mobile services.

1. Specialized Mobile Radio

15. We seek specific comment on the degree to which SMR service is "substantially similar" to any Part 22 mobile service. Historically, SMR was used by licensees primarily to provide dispatch service for businesses, which Part 22 licensees are currently prohibited from providing.[24] Many SMR systems continue to provide dispatch service and will be regulated as PMRS so long as they do not provide interconnected service.[25] As we first recognized in our *Fleet Call* decision, however, some licensees are using SMR as a vehicle to develop wide-area multi-channel interconnected systems that potentially offer the public a competitive alternative to cellular service.[26] In the *Second Report and Order*, we further noted that the advent of wide-area multi-channel SMR was one of the factors that led Congress to revise Section 332 so that these services would be reclassified as CMRS.[27] These similarities suggest that wide-area SMR service and cellular service could be viewed as substantially similar for purposes of the statute. We seek comment on this view.

16. The apparent similarities between wide-area SMR and cellular service, however, do not necessarily apply to all SMR licensees who provide interconnected service and are therefore classified as CMRS providers. In many cases, licensees of local conventional or trunked SMR systems offer only limited interconnected service on a secondary basis to their dispatch operations. The interconnected service offered by these systems to their customers bears little resemblance to cellular service in terms of geographic range, channel capacity, or technical quality, nor does it appear that these licensees are attempting to market their service as a replacement for cellular service. In some respects, the interconnected service offered by these small, local SMR systems may be less analogous to cellular than to traditional common carrier radiotelephone service provided by IMTS licensees.[28] We therefore seek comment on whether this type of SMR service should be regarded as substantially similar to IMTS or any other non-cellular Part 22 service.

2. 220-222 MHz Service

17. We also seek comment on whether commercial interconnected 220-222 MHz services that are reclassified as CMRS are substantially similar to any Part 22 mobile service. The commercial 220 MHz service was established in 1992 to allow licensees to provide two-way narrowband service on both a local and a nationwide basis.[29] Because licensing of the band only commenced in 1993 and most systems are not yet constructed,[30] it is difficult to assess whether commercial 220 MHz licensees will in fact provide service that is similar to any Part 22 service. Based on the limited amount of spectrum available to licensees, however, it appears unlikely that 220 MHz licensees would offer services similar to those provided by cellular or other broadband licensees. Moreover, unlike existing narrowband paging services, 220 MHz is expressly intended for two-way use. Notwithstanding these distinctions, we seek comment on whether 220 MHz service should be viewed as a potential competitive alternative to existing common carrier services. We also seek comment on whether 220 MHz service, particularly on nationwide channels, may be more similar to two-way services likely to be provided by narrowband PCS licensees than to any existing Part 22 service.

---

[24] As amended by the Budget Act, Section 332(c)(2) of the Communications Act confers authority on the Commission to lift the dispatch prohibition. We intend to consider whether the dispatch prohibition should be retained or eliminated in an upcoming proceeding.

[25] Our current licensee data base indicates that approximately half of existing SMR station licenses are for the provision of non-interconnected service. Because wide-area interconnected systems typically contain many more stations than dispatch-only systems, this suggests that while many licensees of large systems may be reclassified as CMRS providers, a larger number of small system licensees are likely to remain classified as PMRS providers.

[26] *Seec* Fleet Call, Inc., *Memorandum Opinion and Order*, 6 FCC Rcd 1533, *recon. dismissedc* , 6 FCC Rcd 6989 (1991). *See also 800 MHz EMSP Notice*, ¶ ¶ 3-4.

[27] *Second Report and Order*, ¶ ¶ 7, 13.

[28] Like IMTS systems, traditional SMRs typically utilize small numbers of paired channels and provide service with a blocking probability much higher than two percent. This is in contrast to cellular systems, which reuse large numbers of channels and provide service with a blocking probability of less than two percent. Traditional SMRs also typically use high-power base station transmitters located at high elevations in order to maximize the service range of each station, while cellular systems use multiple low-power cell sites with moderate service ranges and reuse their channels at relatively short intervals.

[29] *See Report and Order*, Amendment of the Commission's Rules to Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Services, PR Docket No. 89-552, 6 FCC Rcd 2356 (1991), *recon.*, 7 FCC Rcd 4484 (1992).

[30] Because of uncertainty created by a judicial appeal of our filing procedures for 220 MHz applications, which was recently dismissed, all 220 MHz non-nationwide licensees have been granted an extension until December 4, 1994 to construct their systems and commence operations. *See Order*, PR Docket No. 89-552, DA 94-276 (adopted March 28, 1994; released March 30, 1994).

3. Business Radio

18. In the *Second Report and Order*, we determined that Business Radio licensees would be reclassified as CMRS if they provide for-profit, interconnected service to customers.[31] As a practical matter, however, the degree to which Business Radio licensees currently offer services that are similar to or competitive with existing common carrier services appears to be limited. Our licensing records indicate that the vast majority of Business Radio authorizations are for non-profit or non-interconnected uses that will continue to be classified as PMRS.[32] To the extent that Business Radio licensees do provide for-profit interconnected service, such service appears to be more similar to the limited interconnection provided by small conventional SMR systems than to "cellular-type" service. In contrast to SMR, however, licensees have generally not attempted to use Business Radio as a platform for the development of wide-area multi-channel systems. This may be due in part to the fact that most Business Radio frequencies are licensed on a non-exclusive basis and therefore must be shared by multiple licensees.[33] In light of these factors, we seek comment on whether CMRS licensees on Business Radio channels should be considered to provide service that is substantially similar to services provided by Part 22 licensees.

4. Paging

19. Our existing Part 90 and Part 22 paging services appear to be similar in many respects. Both private and common carrier paging licensees provide one-way messaging service that is essentially interchangeable from the customer's point of view. The similarity of the services is accentuated by the fact that paging licensees in each band contend with certain common operating conditions and use similar technology regardless of their regulatory status. The principal historical difference between private and common carrier paging is that wide-area regional and nationwide paging service developed earlier on common carrier frequencies, perhaps because private paging frequencies have historically been shared while common carrier paging frequencies have always been exclusive. In a recent docket, however, we adopted rules for licensing most private paging frequencies above 900 MHz on an exclusive basis that is similar, although not identical, to our licensing of common carrier paging channels.[34] We expect this step to lead to the development of local, regional, and nationwide CMRS paging systems on these frequencies that are technically similar to and competitive with existing common carrier systems. Based on these factors, we tentatively conclude that private and common carrier paging should be deemed substantially similar for statutory purposes. We request comment on this tentative conclusion, and specifically on whether our analysis should differ for paging on Part 90 frequencies below 900 MHz because these paging frequencies continue to be shared. We also ask commenters to address whether paging licensees using Part 90 frequencies below 900 MHz are presently providing service in competition with services provided by common carrier paging systems.

C. Technical and Operational Rules

20. If the Commission determines that a reclassified private land mobile service is "substantially similar" to a common carrier service, as discussed above, the Budget Act requires that we modify our rules, to the extent "necessary and practical," to ensure that the two services are subject to "comparable" technical requirements.[35] We believe that Congress inserted this requirement in recognition of the fact that our existing technical and operational rules[36] in Part 90 and Part 22 are premised on the old private and common carrier classifications that were eliminated by the Budget Act. The statute therefore requires us to modify these rules as necessary so that CMRS licensees providing substantially similar services will not be subject to inconsistent regulation arising out of their prior regulatory status.

21. While seeking regulatory consistency, however, Congress also appears to have recognized that some of our existing technical and operational rules may reflect objective differences in the technical configuration and operation of particular services. The statute expressly focuses on regulations that affect providers of "substantially similar" commercial mobile radio services and requires only such rule changes as are "necessary and practical" to achieve regulatory consistency. This language suggests that even where we determine that commercial mobile radio services regulated under Part 90 and Part 22 are substantially similar, we are not compelled to modify our existing rules if such modification is unnecessary to achieve regulatory symmetry or is otherwise impractical. Moreover, even where we determine that inconsistencies in Part 90 and Part 22 should be conformed, the statute does not compel the rigid application of a uniform rule but affords us the discretion to fashion "comparable" rules.[37]

22. Based on this statutory language, it appears that the Commission has substantial flexibility to determine what technical and operational rule changes are needed to elimi-

---

[31] *Second Report and Order*, ¶ 87. Because Business Radio systems above 800 MHz are prohibited from providing for-profit service, the discussion of Business Radio in this Further Notice is limited to licensees below 800 MHz who are subject to reclassification as CMRS.

[32] According to our current licensing records, fewer than two percent of existing Business Radio licenses authorize the licensee to provide for-profit, interconnected service.

[33] As noted above, Business Radio frequencies above 800 MHz are licensed on an exclusive basis, but may not be used to provide for-profit service. *See* note 20, *supra*.

[34] *Report and Order*, Amendment of the Commission's Rules to Provide Exclusivity to Qualified Private Paging Systems at 929-930 MHz, PR Docket No. 93-35, 8 FCC Rcd 8318 (1993) (*900 MHz PCP Exclusivity Order), recon. pending.*

[35] Budget Act, § 6002(d)(3). The Conference Report states that this provision is intended "to ensure that services that were formerly private land mobile services and become common carrier services as a result of this Act are subjected to technical requirements that are comparable to the technical requirements that apply to similar common carrier services." H.R. Rep. No. 103-213, 103d Cong., 1st Sess. (1993) at 498.

[36] Although the statute refers to "technical" regulations, we believe Congress's use of the term can be construed to include operational as well as technical regulations affecting the delivery of service by CMRS providers. While the Conference Report does not discuss the meaning of this term, the report accompanying the House version of the statute upon which the final language of this provision was based requested the Commission to make "a complete assessment of its rules affecting private land mobile" to determine whether such rules still serve the public interest. H.R. Rep. No. 103-111, 103d Cong., 1st Sess. (1993) at 15.

[37] The final version of the statute appears to have been amend-

nate regulatory inconsistency and what rules the statute does not require to be modified. At this stage in the transition to regulation under revised Section 332, we propose to focus primarily on identifying and conforming differences in technical and operational rules in Part 90 and Part 22 that would otherwise lead to arbitrary and inconsistent treatment of substantially similar CMRS licensees. In addition, we seek comment on whether these technical and operational rules should be fashioned to ensure a basic level of consistency with our PCS rules, which potentially provide another avenue for the development of CMRS applications that are "substantially similar" to existing Part 22 and Part 90 services.

23. In determining whether inconsistencies in the rules should be eliminated or modified, we propose to place particular emphasis on the effects that our various options might have on the future course of competition between providers of substantially similar services. For example, if a reclassified private carrier is subject to rules that vary from the rules governing the operations of its CMRS competitors, we propose to examine the effect that equalization of the rules would have upon ongoing competition between existing licensees as well as the prospects for entry by new competitors. We also would need to examine various options for equalizing the rules in order to determine the possible effects of each option on competition. Finally, we would need to assess whether competition (in the short run or in the long run) might be harmed by such changes in the rules because of practical considerations and difficulties that might be associated with the changes. For example, if a possible change to our technical rules could affect the types of equipment a carrier uses to provide service, we would need to examine the extent to which costs incurred in the conversion to new equipment might impede the carrier's ability to compete.

24. Even in instances where we determine that changes to our technical and operational rules could promote competition, we request comment on the extent to which it is "necessary and practical" at this time to revise specific technical and operational rules to ensure that licensees in reclassified private land mobile services and licensees who provide substantially similar common carrier services are subjected to comparable technical requirements. For example, if a reclassified PMRS offering is substantially similar to another CMRS offering, our analysis would require that we consider modifications to our rules to equalize as much as possible (1) the traffic capacity of the assigned spectrum (*e.g.*, the number of channels available to licensees); (2) the size of the geographic areas in which the similar services are licensed to be provided; (3) the height of antennas and the power of transmitters that the similar services are authorized to use and the reliable service area of each transmitter; (4) the degree of co-channel and adjacent channel interference to which the similar services are subject; and (5) other related technical and operational rules affecting the provision of the similar services. At the same time, there may be instances where we should not change our existing rules, either because the differences in the rules applicable to competing services have a reasonable basis unrelated to competitive considerations or because changing the rules would be impractical. We seek comment on the degree to which the statute gives us the discretion to retain our existing rules based on these factors.

1. Technical Rules

25. We first turn to our technical rules for Part 90 and Part 22 services, including channel assignments, service areas, co-channel protection criteria, transmitter specifications (*e.g.*, emission masks, bandwidth, frequency stability), transmitter operations (*e.g.*, power, antenna height), and modulation schemes. We seek comment on what changes to our technical rules are required to achieve the statutory objectives discussed above and what rules should be retained. We also seek comment on whether we should consider additional changes to our technical rules that would simplify our regulations and facilitate the transition to the new regulatory regime, even if such changes are not immediately required to ensure consistent regulatory treatment of CMRS.

a. Channel Assignment and Service Area

1) Background

26. Perhaps the most basic technical rules in our mobile services regulations are those that govern the amount of radio spectrum assigned to licensees in each service and the geographic area to be served by each licensee. Historically, we have adopted widely varying approaches from service to service. For example, in cellular and broadband PCS, we have allocated large blocks of contiguous spectrum to a limited number of licensees within Commission-defined service areas to enable licensees to provide broadband service to the public: cellular licensees are allocated 25 MHz of spectrum, divisible into 416 paired channels, for use within their Cellular Geographic Service Areas (CGSAs),[38] while broadband PCS licensees will receive 10, 20, or 30 MHz blocks spectrum on a BTA, MTA, or nationwide basis.[39]

27. On the other hand, SMR licensees in the 800 MHz band are assigned either one or five channels at a time from the available pool of 280 channels,[40] although licensees may accumulate additional channels by demonstrating adequate system loading,[41] and licensee service areas are station-based, *i.e.*, defined by the location, antenna height, and transmitter power of each base station in

---

ed to provide more flexibility in this regard. The House version of the legislation would have required the Commission to "equalize" the regulatory treatment of substantially similar mobile services. *See* H.R. 2264, 103d Cong., 1st Sess., § 5206(b)(3)(B), 139 Cong. Rec. H3089 (May 27, 1993).

[38] 47 CFR §§ 22.902(b), 22.903(a). The CGSA is the composite of the service areas of all cells in the licensee's system. In the initial licensing phase for cellular, licensees were allowed a five year fill-in period from the license grant date to expand their CGSAs within the borders of their designated MSAs or RSAs. During this period, a licensee's CGSA cannot extend into an adjacent MSA/RSA without the adjacent licensee's consent, although some exceptions have been made for *de minimus* expansion. *Id.*, §§ 22.903(a),(c). Unserved area CGSAs are also restricted to a single MSA or RSA during "Phase I" licensing, but may cover unserved areas in more than one MSA/RSA in Phase II. *Id.*, 22.902(b)(4).

[39] *See Broadband PCS Order*, ¶ 56.

[40] 47 CFR §§ 90.617, 90.621(a)(1)(iv), 90.623. Fewer channels are available in the US/Mexico and US/Canada border regions. *Id.*, § 90.619. The 150 General Category channels are also available for assignment to SMR systems as well as other Part 90 services. *See id.*, § 90.615.

[41] *Id.*, §§ 90.631(c), 90.633(e). *See also* ¶ ¶ 67-73, *infra*.

the licensee's system.[42] In the 900 MHz SMR band, we have allocated 200 channels in 10-channel blocks.[43] To date, licensing at 900 MHz has been limited to 46 Commission-defined "Designated Filing Areas" (DFAs), which roughly correspond to a 100-mile radius around each of the top 50 urban markets in the country.[44] In our *900 MHz Phase II* docket, we have proposed to begin licensing outside the DFAs so that systems may operate on a nationwide, regional, and local basis.[45]

28. The Commission has adopted diverse approaches to channel assignment in other mobile services as well. Under Part 22, common carrier paging and two-way IMTS systems operate on several bandwidths that are assigned on a channel-by-channel basis, with service areas defined by geographic separation between stations.[46] Under Part 90, Business Radio licensees operate on single channels, most of which do not have defined service areas because frequencies are subject to co-channel sharing.[47] Private paging frequencies are also assigned on a co-channel sharing basis, except in the 929-930 MHz band, where we have recently converted to exclusive licensing of local, regional, and nationwide systems.[48] In the 220-222 MHz service, 130 channels are allotted singly or in five-channel blocks for local commercial or non-commercial use, while four five-channel blocks are licensed for commercial use on a nationwide basis.[49] Finally, in narrowband PCS, licensees will be allotted one to three narrowband channels in a BTA, one of five designated PCS regions, or nationwide.[50]

2) Discussion

i. SMR

29. We first seek comment on whether our channel assignment rules for 800 or 900 MHz SMR should be revised to facilitate licensing on a wide-area, multi-channel basis comparable to our licensing of cellular and broadband PCS spectrum. As noted above, our existing 800 MHz SMR rules were designed to license spectrum on a site-by-site, channel-by-channel basis. As a result, SMR licensees seeking to build wide-area multi-channel systems, unlike cellular or broadband PCS licensees, must apply separately for each individual station site and for each conventional channel or trunked channel group in its system. To facilitate development of wide-area systems under these procedural requirements, we have granted waivers and, more recently, adopted rules allowing licensees an extended time period to construct their systems. If we determine that these services are in fact substantially similar to cellular or PCS, however, it could also be argued that the statute requires us to develop comparable channel assignment procedures for SMR licensees that will enhance their ability to compete.

30. The issue is complicated, however, by the varied nature of 800 MHz SMR services. Although some SMR licensees have accumulated a sufficient number of channels in certain markets to establish wide-area "cellular-type" service, many others operate traditional SMR systems designed primarily to provide dispatch service to small groups of customers.[51] These licensees typically do not require wide-area multi-channel assignments, and many of them are likely to be classified as PMRS rather than CMRS because they do not provide interconnected service. In addition, our channel assignment procedures often result in traditional and wide-area systems operating on the same or adjacent channels in close proximity to each other. Given this diversity of existing uses of 800 MHz channels, we seek comment on the manner in which any revisions to our channel assignment rules intended to make wide-area SMR service more comparable to other wide-area CMRS offerings should be tailored to minimize disruption to other segments of the SMR industry and the services they provide.

31. In this regard, we believe a possible alternative at 800 MHz would be to retain our existing channel assignment rules for traditional SMR systems, but also to establish an alternative mechanism for licensees who seek to provide multi-channel wide-area service. This is similar to the approach that we proposed for 800 MHz wide-area licensing in the *800 MHz EMSP Notice* shortly before passage of the Budget Act. In that docket, we proposed to streamline our site-by-site, channel-by-channel licensing procedures so that licensees would be able to acquire blocks of up to 42 unconstructed channels within an MTA-based service area under a single "EMSP" license.[52] We further proposed that licensees would not be required to demonstrate loading to obtain an EMSP license, but would instead be required to cover 80 percent of their service areas within five years.[53]

32. In light of the statutory changes that have occurred since comments were received in response to the *800 MHz EMSP Notice*, we believe that further comment should be elicited on our approach to 800 MHz SMR licensing. We continue to believe that a wide-area alternative at 800 MHz is both feasible and consistent with the statutory goal of achieving comparable technical rules for substantially similar services. Our current view of this issue, however, is influenced by the fact that a high volume of applications in recent months has caused the 800 MHz band to become heavily occupied in virtually all major markets and in many secondary markets and rural areas as well. In addition, 800 MHz licensees who have already been granted

---

[42] 47 CFR § 90.621(c). *See also Report and Order*, Co-Channel Protection Criteria for Part 90, Subpart S Stations Above 800 MHz, PR Docket No. 93-60, 8 FCC Rcd 7293 (1993) (*800/900 MHz Co-Channel Protection Order*).

[43] 47 CFR §§ 90.617 (non-border area frequencies), 90.619 (border area frequencies), 90.621(a), 90.623.

[44] *See* Public Notice, Private Land Mobile Application Procedures for Spectrum in the 896-901 MHz and 935-940 MHz Bands, 1 FCC Rcd 543 (1986).

[45] *900 MHz Phase II Notice*, ¶ ¶ 10-19.

[46] *See generally* 47 CFR §§ 22.501 *et seq*.

[47] Business Radio channels below 470 MHz are licensed on a shared basis. 47 CFR §§ 90.75(b), 90.173(a). Business Radio licensees may obtain exclusivity on certain frequencies in the 470-512 MHz band by meeting loading requirements, but these frequencies are also allocated to UHF-TV and are therefore available in only 13 markets. *Id*., §§ 90.311, 90.313.

[48] *Id*., §§ 90.75(b), (c)(10); 90.494(a). *See generally PCP Exclusivity Order*, ¶ ¶ 9-21.

[49] 47 CFR §§ 90.715, 90.717, 90.719, 90.721.

[50] *See Narrowband PCS Reconsideration Order*, ¶ 15.

[51] According to a recent study, at the end of 1992, there were 295,000 interconnected SMR mobile units in service and 1,048,000 dispatch SMR mobile units. Merrill Lynch, "SMR in the United States: a Window of Opportunity," at 31 (Table 11) (Oct. 1993). *See also* note 25, *supra*.

[52] *800 MHz EMSP Notice*, ¶ ¶ 20-32.

[53] *Id*., ¶ ¶ 37-39.

extended implementation periods to construct wide-area systems have already substantially defined their intended service areas. We therefore seek comment on whether the amount of spectrum still available at 800 MHz is sufficient to support multi-channel licensing on an MTA-wide basis, or whether imposing such a structure might actually impede the growth of wide-area service.

33. As an alternative to MTA-based licensing, we seek comment on whether our wide-area objectives could be more practically achieved by allowing 800 MHz licensees to establish and operate in self-defined service areas. Under one possible approach, 800 MHz licensees seeking to provide wide-area service would immediately designate the areas in which they intend to operate, based either on the aggregate area covered by their existing authorizations or on new applications to cover designated areas where frequencies are available. Licensees authorized to provide wide-area service on this basis would then have a fixed period of time to build out their systems based on our existing extended implementation rules for SMR, which allow licensees who meet the requirements of the rules up to five years to construct wide-area systems.[54] Another alternative would be to require 800 MHz licensees who are constructing wide area systems under extended implementation authority to define their service areas at the end of the statutory transition period for grandfathered licensees (*i.e.*, August 10, 1996), and would then have until the expiration of their extended implementation period to complete construction. Under either scenario, a wide-area licensee's service area would ultimately be defined based on facilities actually constructed and operating at the conclusion of the construction period, after which the Commission would take back authorizations in still-unserved areas for relicensing. We seek comment on these alternatives and on any other procedures for 800 MHz wide-area licensing that would be consistent with the goal of establishing comparable technical rules for substantially similar services.

34. In contrast to 800 MHz, the 900 MHz SMR band has not been extensively licensed, causing occupancy to remain relatively light. We therefore seek comment on whether we should proceed with our *900 MHz Phase II* proposal to introduce wide-area licensing in the 900 MHz SMR band. Based on the comments to that proceeding, which we incorporate into the record here, and based on subsequent decisions regarding allocations for PCS, we believe that licensing of 900 MHz could readily proceed on an MTA, BTA, and nationwide basis. While the channel blocks available to 900 MHz licensees would be less spectrum than is available to 800 MHz SMR, cellular, or broadband PCS licensees,[55] we believe that the assignment of contiguous channels on a wide area-basis would allow licensees to create viable regional and national CMRS systems, providing needed voice and data communication services to a variety of end users. We seek comment on this approach.

ii. Other Part 90 Services

35. We also seek comment on whether it is necessary or practical to revise our channel assignment rules with respect to Part 90 services other than SMR that are subject to reclassification as CMRS. For example, in the case of Business Radio and private paging services assigned to shared frequencies below 800 MHz, we have sought comment on whether licensees are providing service that is "substantially similar" to existing Part 22 services licensed on exclusive channels.[56] Even if we conclude that substantial similarity exists, however, the extensive sharing of channels by existing licensees on these frequencies could make it difficult to superimpose a system of exclusive channel assignments comparable to our assignment of common carrier frequencies.[57] In addition, any change to our channel assignment rules in these bands would necessarily affect the operations of numerous PMRS as well as CMRS licensees in these services. We seek comment on this analysis. Specifically, assuming *arguendo* that we find Part 90 services other than SMR to be substantially similar to CMRS services, we ask commenters to address the issue of whether we should limit the shared use of channels in such services as a means of promoting competition. If such limitations are necessary, we also ask commenters to suggests methods by which such limitations could be implemented to achieve comparable technical requirements while at the same time minimizing the practical concerns we have identified in this paragraph.

36. In the case of 900 MHz paging, our rules for assigning common carrier and private paging frequencies are already very similar. The 40 common carrier paging channels at 931-932 MHz are assigned exclusively based on geographic separations between stations, except for three channels that have been designated for nationwide systems.[58] In our *900 MHz PCP Exclusivity Order*, we recently adopted a similar although not identical approach for 35 of the 40 929-930 MHz private paging frequencies that allows licensees to earn local, regional, or nationwide exclusivity by constructing systems of a specified size and configuration.[59] Because geographic separation criteria for systems on these channels are identical to the separations applied to 930-931 MHz common carrier paging systems, this step has arguably made our channel assignment rules in these services "comparable" for statutory purposes. It could also be argued, however, that some additional conforming of these rules is required.[60] We seek comment on this issue.

---

[54] *See* 47 CFR § 90.629.

[55] We have proposed to license the 200 SMR channels in the 900 MHz band based on 20-channel blocks. *900 MHz Phase II Notice*, ¶ ¶ 13-14.

[56] *See* ¶ ¶ 18-19, *supra*.

[57] In the *Refarming Notice*, we proposed to use a marketplace mechanism called "exclusive use overlay" (EUO) to enable licensees to convert shared channels to exclusive channels in the 150-174, 421-430, and 450-470 MHz bands. Under EUO, a channel may be designated as exclusive to a given licensee (*i.e.*, closed to new licensing in a designated area) if all fully loaded co-channel licensees in the area consent to the designation. *See Refarming Notice*, ¶ 12, Appendix A at 10.

[58] *See* 47 CFR §§ 22.501(p)(1), 22.503(d).

[59] *See 900 MHz PCP Exclusivity Order*, ¶ 18-19; 47 CFR §§ 90.495(a),(b). Prior to the *Report and Order*, all 929-930 MHz paging channels were allocated on a shared basis, and five of the 40 channels will continue to be shared.

[60] For example, while Part 90 and Part 22 use identical separation criteria, Part 22 also provides for a "reliable service area" around each paging station for purposes of interference protection. *See* 47 CFR § 22.504(b). Part 90 contains no similar provision.

37. In addition, we encourage commenters to address whether we should continue to use station-defined service areas in 900 MHz paging generally or whether it is feasible to base future licensing on Commission-defined service areas. The latter approach would arguably be consistent with our narrowband PCS decision, in which we opted to allocate spectrum based on Commission-defined service areas (*e.g.*, BTAs) rather than on station-defined geographic separations. Because narrowband PCS will operate on spectrum adjacent to existing 900 MHz paging frequencies and is suitable for advanced paging and messaging services, adopting comparable service areas for 900 MHz paging could increase opportunities for channel aggregation across all 900 MHz narrowband services in a common service area. We seek comment on this view.

38. Finally, we seek comment on channel assignment in the 220 MHz service. The 220 MHz band includes four five-channel blocks of paired narrowband (5 kHz) channels for nationwide commercial use, 20 five-channel blocks available for either commercial or non-commercial use on a local basis, and 30 additional local narrowband channels available either individually or in groups. As noted above, because 220 MHz is a new service, it is difficult to assess whether it is likely to compete with any existing Part 22 service or whether it will be a competitor of narrowband PCS. Nonetheless, assuming that we find 220 MHz service to be substantially similar to CMRS services, we seek comment regarding whether and to what extent we should revise the channel assignment and service area rules applicable to 220 MHz service in order to achieve comparable technical requirements between 220 MHz service and competitive CMRS services. In this regard, we note that a Petition for Declaratory Ruling on this issue has been filed by SunCom Mobile & Data, Inc. (SunCom).[61] Specifically, SunCom seeks permission to aggregate non-nationwide 220 MHz five-channel blocks on a regional basis so that it may provide multiple-market service on a single system.[62] We are incorporating the SunCom petition into this docket and invite comment on whether the statutory goals at issue in this proceeding would be furthered by allowing regional licensing of 220 MHz systems, and if so, what regulatory restrictions would be appropriate to ensure comparable treatment to similar mobile services (*e.g.*, limiting the number of channels available to a single licensee within a particular area, designating areas of operation in accordance with Commission-defined regions, such as BTAs or MTAs, etc.).

b. Co-Channel Interference Protection

39. *Background.* Most of our existing mobile services (other than those on shared channels) operate under co-channel interference rules to ensure that licensees do not cause interference to adjacent licensees operating on the same frequency.[63] Because these rules are integrally related to the service area definitions used in each service, co-channel protection criteria vary from service to service. A key factor in formulating these criteria is whether the service uses Commission-defined or station-defined service areas. Where Commission-defined areas (*e.g.*, MSAs, MTAs, BTAs) are used, as in cellular, broadband PCS, and narrowband PCS, the rules are typically designed to prevent interference at or near service area boundaries, but licensees have significant flexibility over the placement and operation of stations away from border areas.[64] On the other hand, where service areas are station-defined, as in the Public Land Mobile Services, 800/900 MHz SMR, 900 MHz paging, and local 220-222 MHz service, each base station in the licensee's system must be located and operated in accordance with strict geographic separations and/or field strength determinations in order to ensure that the co-channel stations of other licensees are protected.[65]

40. *Discussion.* We seek comment on whether the statutory goal of comparable technical regulation for substantially similar services requires us to revise our co-channel interference criteria for any mobile service. We recognize that this is a particularly complex issue because changes to our current rules could have a direct impact on the location of stations and selection of equipment in existing systems. If we elect to impose stricter interference protection criteria in a particular service, for example, licensees could be required to make costly equipment changes to reduce the potential for interference. Conversely, relaxing existing interference rules could result in licensees facing increased interference from co-channel stations. We seek comment on these issues, and specifically invite commenters to provide information on the type and level of potential costs to licensees that would result from modifying existing interference protection criteria. We also seek comment on whether such changes should be made only if

---

[61] Request for Declaratory Ruling and Request for Rule Waiver, dated February 1, 1994.

[62] Section 90.739 provides that no 220 MHz licensee will be authorized to operate multiple stations in the same channel category (*e.g.*, five-channel non-nationwide) within 40 miles of each other "unless that licensee can demonstrate that the additional system is justified on the basis of its communications requirements." *See also Report and Order*, PR Docket No. 89-552, 6 FCC Rcd 2356 (1991), ¶ ¶ 58-59.

[63] Licensees on shared frequencies are required to cooperate with each other to avoid harmful co-channel interference. 47 CFR § 90.173(b).

[64] Cellular licensees, for example, must coordinate frequency usage within 75 miles of their CGSA borders with adjacent licensees. 47 CFR § 22.902(d)(1). Narrowband PCS licensees must maintain 70-mile separation from co-channel stations in neighboring regions and must also reduce base station antenna height and transmitter power at distances of less than 200 kilometers (124 miles) from the service area border. *Id.*, §§ 99.132(e), 99.134. Subject to reconsideration, broadband PCS licensees will be required to limit their signal field strength to 47 dBu at the border of their service areas. *Id.*, § 99.232. (The Commission's PCS rules, originally contained in Part 99, have recently been redesignated as Part 24. *Second Report and Order*, Appendix A, at 10. This redesignation has not yet taken effect.)

[65] Placement of co-channel stations in the Public Land Mobile Service is determined by geographic separations based on antenna height and transmitter power, and each station receives protection from interference within a "reliable service area." *See* 47 CFR § 22.503, 22.504. The reliable service area is based on field strength contour, except in the case of 931-932 MHz paging, where a geographic radius is used. *Id.*, § 22.504(b)(2). SMR stations are subject to a standard separation of 113 kilometers (70 miles), although licensees may "short-space" stations down to 88 kilometers (55 miles) by reducing their antenna height and transmitter power pursuant to a separations table based on a 40/22 dBu interference ratio. *Id.*, §90.621(b); *see also 800/900 MHz Co-Channel Protection Order*, ¶ ¶ 10-13. The minimum separation between stations in co-channel local 220 MHz systems is 120 kilometers (75 miles), although licensees may short-space based on a 38/10 dBu interference ratio. *Id.*, § 90.723(f).

(1) existing interference criteria for substantially similar services are plainly inconsistent, and (2) conforming the rules would not impose unnecessary burdens on licensees. We also seek comment on the potential nature and extent of such burdens and on the weight that competitive factors should be given in our assessment of the need to conform the rules.

41. We note that a cautious approach to rule revisions in this area does not imply that no changes to our co-channel interference rules can be justified. For example, our proposals to establish wide-area service in the 800 and 900 MHz SMR bands could potentially eliminate the need for station-defined co-channel protection criteria for wide-area licensees. If we proceed with these proposals, we seek comment on whether wide-area licensees should be subject to restrictions on co-channel station separation or interference other than at the borders of their service areas. In the *800 MHz EMSP Notice*, for example, we proposed to eliminate separation requirements for wide-area licensees (except as necessary to protect existing non-wide-area systems) and instead to require only that wide-area licensees limit their signal strength to 22 dBu at their service area borders.[66] We have proposed a similar approach in the *900 MHz Phase II Notice* based on a 30 dBu signal at the service area border.[67] Such an approach to co-channel separation for wide-area SMR systems would be similar to the rules applicable to cellular systems, which require licensee coordination of frequency usage within a given distance of a common border, and the rules adopted for PCS, which also specify maximum border area field strength.[68] We therefore seek comment on whether adoption of the criteria proposed in our 800 and 900 MHz dockets would meet the statutory requirement of comparable technical regulation for substantially similar services.

c. Emission Masks

42. *Background.* To protect against adjacent channel interference, most mobile radio services operate under "emission mask" rules that restrict transmitter emissions on a range of frequencies removed from the licensee's assigned frequency. These rules typically vary depending upon the bandwidth and spacing of channels in each particular service (*e.g.*, 25 kHz channels for 800 MHz systems, 12.5 kHz channels for 900 MHz systems, 30 kHz channels for cellular systems, etc.) and the manner in which adjacent channels in the service are allocated. For example, licensees in Part 90 services that are assigned small numbers of channels within a limited geographic area are likely to have other licensees operating on adjacent channels within the same geographic area. Thus, a "tight" emission mask is required to ensure minimal interference among such systems.[69] Conversely, cellular licensees, who receive large numbers of contiguous channels within a large geographic area and design their systems in a cellular configuration, have more flexibility to use channels in a manner that minimizes interference to themselves and any neighboring cellular operators. Cellular emission mask standards, therefore, are less rigorous than Part 90 standards.[70]

43. *Discussion.* We seek comment on whether our existing emission mask rules are consistent in their application to substantially similar services. Because specific emission limitations are dependent on such service-specific factors as bandwidth, channel spacing, and the likelihood that different licensees will operate on adjacent channels, substantial changes to these rules may not be necessary or practical. In the case of SMR and cellular, for example, the differences in licensing and channel allocation suggest that it would be impractical either to tighten emission standards for cellular or to loosen them for SMR. On the other hand, even if SMR service evolves in a manner that allows licensees to aggregate large numbers of channels to create cellular-type systems, there will almost certainly be a continued need for strict emission standards where adjacent channels are assigned to different licensees. We seek comment on this issue.

44. In other instances, our Part 22 and Part 90 emission rules already appear to meet the requirement of comparable regulation. With regard to 900 MHz paging operations, for example, both Part 22 and Part 90 systems utilize identical 25 kHz channel spacings and are governed by the same emission limitations,[71] bandwidth limitations,[72] and transmitter frequency tolerances.[73] We therefore propose no changes to the rules for these services. We do seek comment, however, on whether there are other instances where our emission standards are inconsistent as applied to substantially similar services.

d. Antenna Height and Transmitter Power Limits

45. *Background.* Both Part 22 and Part 90 set limits on base station antenna height and transmitter power for all mobile services, which are largely defined on a service-specific basis. Our cellular rules, for example, limit cellular base station power to 500 watts effective radiated power (ERP) based on an antenna height of 152 meters (500 feet) above average terrain (AAT).[74] Public mobile base stations below 470 MHz are generally subject to the same restrictions,[75] although stations in some bands may be operated at higher power on a "fill-in" basis, *i.e.*, so long as they do not expand the interference contour of the system as a

---

[66] *800 MHz EMSP Notice*, ¶ ¶ 35-36. Because of the large number of traditional SMR systems intermingled with potential wide-area systems in the 800 MHz band, the *Notice* proposed that all EMSP applicants be required to meet co-channel spacing requirements with respect to any non-EMSP system in their proposed service area. *Id.* We continue to believe that any steps to taken to facilitate the development of wide-area systems at 800 MHz must provide continued protection for co-channel licensees operating traditional SMR systems.

[67] *900 MHz Phase II Notice*, ¶ 41.

[68] *See* note 64, *supra*.

[69] *See* 47 CFR §§ 90.209, 90.211, 90.213.

[70] *See id.*, § 22.907. Bandwidth and modulation limits for non-cellular Public Land Mobile Services are set forth in Sections 22.507 and 22.508.

[71] *Compare* 47 CFR §§ 90.211(d)(1)(ii), 90.209(c)(1), and 90.209(g) *with* §§ 22.508(g), 22.106(a), and 22.106(b)(2).

[72] *Compare* 47 CFR § 90.209(b) *with* § 22.507.

[73] *Compare* 47 CFR § 90.213 *with* § 22.101.

[74] 47 CFR §§ 22.904, 22.905. Where base station transmitter height is more than 152 meters, the licensee must reduce ERP proportionately unless it has the consent of all neighboring carriers within 75 miles of the station.

[75] *Id.*, §§ 22.505(a), 22.506(a). In the 470-512 MHz band, height and power limits vary depending on the base station's distance from the nearest co-channel UHF-TV station. *See id.*, § 22.501(j).

whole.[76] Common carrier paging stations in the 931-932 MHz band are generally limited to a maximum of 1000 watts ERP at 305 meters (1000 feet) AAT, but may transmit at up to 3500 watts on the three designated nationwide channels and on a fill-in basis on other frequencies.[77]

46. Under Part 90, trunked SMR systems and conventional SMR systems in urban areas may operate base stations at up to 1000 watts ERP at 305 meters AAT, while conventional systems outside urban areas are limited to 500 watts ERP and 152 meters AAT.[78] With some exceptions, the maximum power on shared frequencies below 470 MHz used by Business Radio licensees is 350 watts.[79] The maximum power for 220-222 MHz base stations is 500 watts ERP at 150 meters AAT.[80] Finally, 900 MHz paging licensees under Part 90 may operate at 1000 watts ERP at 305 meters AAT, except that nationwide licensees may operate at up to 3500 watts ERP.[81]

47. In addition to restrictions on base station height and power, both Part 22 and Part 90 set limits on mobile station transmitter power. Cellular mobiles and portables are limited to 7 watts ERP, and the maximum output power for mobiles in non-cellular Public Land Mobile Services is 60 watts.[82] SMR mobiles may operate at up to 100 watts maximum output, and 220 MHz mobile units are limited to 50 watts ERP.[83] In a separate docket, we have also proposed to adopt the 1992 ANSI/IEEE standards governing exposure to radiofrequency (RF) radiation, which would limit the permissible power of low-power hand-held mobile units used in cellular and other land mobile services.[84]

48. *Discussion.* In general, we believe that substantially similar mobile services should operate under comparable restrictions on antenna height and transmitter power. At the same time, we believe our height and power rules should encourage technical flexibility and allow licensees to serve diverse customer needs wherever possible. With these principles in mind, we seek comment on whether existing height and power limitations for substantially similar Part 90 and Part 22 services should be amended.

49. Under our existing Part 22 rules, cellular base stations are subject to relatively strict height and power limits because cellular technology relies on closely spaced multiple cells and frequent channel re-use. On the other hand, Part 90 power limits for 800 and 900 Mhz base stations are set at higher levels to accommodate traditional dispatch systems that use high-power base stations to transmit to small groups of users over relatively large areas. The same principles apply to power limits on mobile stations: the maximum allowable power for cellular mobiles is significantly lower than the maximum power for SMR mobiles. This reflects the fact that cellular subscribers use lightweight mobiles that do not require high power to reach the nearest cell site, while SMR users sometimes require higher-power mobiles because base stations are more widely dispersed.

50. In light of the above differences, we seek comment on whether our cellular and SMR rules on base station height and power should be conformed. To the extent that we conclude that wide-area SMR is substantially similar to cellular service, it could be argued that SMR licensees who acquire enough channels to operate cellular-type systems should be required to comply with power limits comparable to those prescribed for cellular licensees. To the extent that traditional SMR service is not substantially similar to cellular service, however, existing height and power limits for each service should arguably be retained.[85] A third alternative that could be applied to wide-area SMR systems and cellular systems would be to limit station power at the licensee's service area border, but give licensees greater flexibility over station power within the interior portions of their service areas. We seek comment on the feasibility and practical effect of these alternatives. In particular, we invite commenters to address the nature and extent of costs and other burdens that would be faced by CMRS licensees if we were to modify our existing antenna height and power rules, and to suggest how any such costs or burdens should be balanced against the statutory objective of establishing comparable technical requirements for substantially similar services.

51. We also seek comment on whether height and power limits for lower band Part 90 services should be conformed to those of substantially similar Part 22 services. We note that on Part 90 lower band frequencies that are shared, it may not be practical to adopt the typically higher power limits that apply to Public Land Mobile Service licensees on exclusive channels. In the case of 220 MHz service, which is licensed on an exclusive basis, our evaluation of height and power limits depends on whether we conclude that 220 MHz service is substantially similar to any existing Part 22 service. Assuming we reach that conclusion, we seek comment on whether it is necessary to revise our 220 MHz height and power rules and what the practical consequences would be of doing so.

52. With regard to the existing power limits for 900 MHz paging systems, the rules in Part 22 and Part 90 are already highly similar. We seek comment, however, on whether non-nationwide licensees at 929-930 MHz should be allowed to operate at up to 3500 watts within their existing service areas, as non-nationwide paging systems under Part 22 are currently allowed to do. We also seek comment on whether our height and power rules could be made more flexible for wide-area paging generally. For comparison, our narrowband PCS rules generally allow operation at 3500 watts ERP, but licensees must reduce their power levels in accordance with a prescribed formula at the borders of their service areas.[86] We seek comment on the feasibility of applying this approach to existing 900 MHz paging services also.

---

[76] *Id.*, § 22.506(f).
[77] *Id.*, §§ 22.505(c)(2), 22.506(f)(2).
[78] *Id.*, § 90.635.
[79] *See id.*, § 90.205(b).
[80] *Id.*, § 90.729(a).
[81] *Id.*, § 90.494(f),(g).
[82] *Id.*, §§ 22.506(c), 22.904
[83] *Id.*, §§ 90.635(d), 90.729(b).
[84] *See Notice of Proposed Rule Making*, ET Docket No. 93-62, 8 FCC Rcd 2849 (1993) (*RF Radiation Notice*). We have also expressly adopted this standard for PCS mobile units in our PCS rules. *See Broadband PCS Order*, ¶ ¶ 191-192; 47 CFR § 99.52.
[85] Although SMR height and power limits are higher than the equivalent restrictions on Part 22 non-cellular systems, SMR systems also operate in higher bandwidths where more power is required to attain the same signal range.
[86] *See* 47 CFR § 99.132(e). The 3500 watt ERP limit applies

53. Finally, we seek comment on these alternatives as they affect our power limitations on mobile units. As noted above, the limits applicable to particular services vary from the 7-watt limit for cellular mobiles to the 100-watt limit for SMR mobiles. In general, we expect that Part 90 systems seeking to compete with cellular will use similar low-power technology to provide lightweight and easily portable mobiles to the end user. At the same time, users of traditional Part 90 systems may continue to need higher-power mobiles in order to obtain effective service. Accordingly, we seek comment on whether existing power limits for mobile units in Part 22 and Part 90 should be retained or conformed. Aside from any such action, however, we believe that all mobiles must comply with power limits dictated by applicable RF radiation standards, regardless of the service in which they are used. We therefore propose to apply the 1992 IEEE/ANSI standard to all CMRS and PMRS mobiles, as proposed in the *RF Radiation Notice*.[87]

e. Modulation and Emission Requirements

54. *Background.* In some instances, our mobile services rules specify particular modes of transmission that may or may not be used by licensees. Part 22 licensees are generally subject to channeling, modulation and emission requirements under Subpart C.[88] Cellular licensees are also subject to specific emissions requirements,[89] but have the option to use any transmission mode provided that (1) interference to other cellular systems is not created, and (2) analog service is made available to all customers with analog equipment.[90] SMR systems at 800 and 900 MHz are expressly permitted to provide "digital or analog transmissions."[91] Other Part 90 paging licensees are limited to using certain emission types specified in the rules.[92] Part 90 also imposes restrictions on systems operating on shared channels (*e.g.*, digital voice emissions are not permitted on the channels below 800 MHz except for systems operating in the Police, Fire and Power Radio Services).

55. *Discussion.* We seek comment on whether there is any continued need for emission restrictions of the type described above in services where frequencies are licensed on an exclusive basis. So long as licensees comply with other technical requirements designed to guard against co-channel interference, adjacent channel interference, and similar problems, we see no reason why our rules should limit the types of transmissions that may be used. Such an approach would also be consistent with our new PCS rules, which afford licensees system design flexibility and do not restrict licensees to any particular modulation or channel access technology. We note that by proposing to allow licensees greater flexibility in this area, we do not intend to modify or eliminate the requirement that cellular licensees provide analog service to customers with analog equipment. In addition, we believe that where services are licensed on a shared basis, existing emission restrictions should be retained in order to ensure that licensees do not engage in incompatible uses of common frequencies. We seek comment on these proposals.

f. Interoperability

56. *Background.* At the inception of cellular radio service, we adopted interoperability rules that require all cellular telephones to be capable of operating on all cellular channels and capable of successfully interacting with the base stations of all cellular radio service providers.[93] These rules were designed to protect cellular customers against incompatible equipment and to ensure that customers would have the ability to "roam" from one licensee's service area to another. We have subsequently liberalized these rules to allow the cellular industry to develop "alternative cellular technologies," provided these technologies allow interconnection with the public switched network consistent with certain technical specifications.[94] We have not imposed similar interoperability requirements on non-cellular Part 22 licensees, however, or on private radio services.

57. *Discussion.* We seek comment on whether any Part 90 CMRS licensees should be subject to mandatory interoperability requirements similar to those applicable to cellular licensees. For example, if we determine that wide-area SMR systems provide service that is substantially similar to cellular, based on our conclusion that the two services are in competition with each other, we must then decide whether they should be subject to similar rules ensuring that SMR customers have access to compatible equipment and the ability to use that equipment on any wide-area SMR system. We recognize that mandating uniform interoperability standards for various classes of CMRS equipment is potentially costly and could result in standards that do not reflect the rapid pace of development in mobile radio technology. In light of these considerations, we ask commenters to address whether we should (1) establish interoperability standards intended to achieve interoperability among all classes of CMRS equipment; (2) establish such standards to achieve the narrower objective of promoting interoperability among different types of equipment used to provide the same type or class of CMRS service; or (3) maintain the *status quo* by retaining interoperability requirements for cellular equipment but refraining from any extension of these requirements to other classes of CMRS services. We ask commenters, in addressing these options, to assess the extent to which each approach would promote competition and access to the public switched network. In addition, we seek comment on

---

without an antenna height limitation, except that for stations located between 200 and 80 kilometers of the licensee's border, maximum power levels are reduced in accordance with the Table in Section 99.132(d).

[87] This proposal is subject to any modification of these standards that may be adopted in the *RF Radiation* proceeding.

[88] 47 CFR § 90.104(a)(1). Public Land Mobile licensees are automatically authorized to use the emission types listed in the rule or may request developmental authority to use other emission types. *Id.*, § 90.104(a)(4).

[89] *Id.*, § 90.907.

[90] *Id.*, § 22.930.

[91] *Id.*, § 90.645.

[92] *See id.*, § 90.207.

[93] This was accomplished by requiring manufacturers to build equipment in compliance with Office of Engineering and Technology Bulletin No. 53 (Cellular System Mobile Station - Land Station Compatibility Specification). *See Report and Order*, CC Docket No. 79-318, 86 FCC 2d 469 (1981), Appendix D; *see also* 47 CFR § 22.915(a).

[94] *See* 47 CFR § 22.930.

other alternatives for encouraging the development of compatible equipment by CMRS providers if we decline to adopt interoperability standards.

2. Operational Rules

58. In addition to the technical rules discussed above, we believe it is appropriate to review our existing operational rules applicable to Part 90 and Part 22 services in order to ensure that reclassified private land mobile services are subject to operational rules comparable to the operational rules for substantially similar common carrier services. These rules define the Commission's requirements for mobile services in matters such as time to construct, channel loading and area coverage requirements, assignment and transfer of licenses, user eligibility, general licensee responsibility and system operation, and equal opportunity in employment. In each instance, we seek comment on whether implementing comparable regulation for similar services requires us to conform our existing Part 22 and Part 90 rules, and if so, how those rules should be conformed.

a. Construction Period and Coverage Requirements

59. *Background.* Both Part 90 and Part 22 require mobile service licensees to construct their facilities within a specified period following initial grant of a license. The maximum time to construct in each service typically depends on the geographic scope and technical complexity of systems in that service. Thus, licensees of mobile systems that are neither unusually complex, deployed throughout wide areas, nor subject to multi-year planning cycles must construct within a relatively short time period. For example, Part 22 generally allows Public Land Mobile Service licensees 12 months to construct common carrier mobile systems.[95] Most Part 90 licensees, including conventional SMR, local 220-222 MHz, Business Radio, and private paging licensees, must construct within 8 months,[96] although licensees of trunked systems are subject to a 12-month limit.[97]

60. Services that are technically more complex and/or that will cover large geographic areas are typically afforded longer construction periods. In wide-area services such as cellular, nationwide 220 MHz, and PCS, we have adopted multi-year construction periods, which are usually combined with interim coverage requirements or benchmarks to ensure that licensees deploy their systems throughout their service areas on a phased basis.[98] Thus, cellular carriers in the top 90 markets were given five years to fill in their CGSA and were required to cover 75 percent of the CGSA within three years.[99] Licensees of 220 MHz nationwide commercial systems have 10 years to construct their systems, but must cover increasing percentages of their designated geographic area at two, four, and six years after the license grant.[100] Broadband PCS licensees must construct sufficient facilities to make service available to one-third of their service area population within five years, two-thirds of the population within seven years, and 90 percent of the population within 10 years.[101]

61. We have taken a somewhat different approach to construction periods for 800 and 900 MHz wide-area systems. Under our current rules, SMR licensees are presumptively subject to the 8-month limit for conventional systems and 12 months for trunked systems, but a licensee may obtain an extended construction period of up to five years by demonstrating that more time to construct is necessary due to the complexity, purpose, or coverage of the proposed facilities.[102] On this basis, we have granted multi-year construction periods to most SMR licensees seeking to construct wide-area systems. We have recently adopted a similar extended implementation option for 929-930 MHz paging systems, which allows regional or nationwide licensees up to three years to construct provided they make a sufficient showing of need to the Commission and underwrite the proposed construction cost by means of a performance bond or escrow account.[103] Licensees of nationwide common carrier paging systems at 931-932 MHz must provide signaling to at least 15 SMSAs and build out their systems within two years.[104]

62. *Discussion.* To ensure comparable treatment of substantially similar services, we believe a uniform "baseline" construction period should be applied to all CMRS licensees whose systems do not require an unusually long time to construct. In particular, we see no reason why Part 90 CMRS licensees should be limited to an 8-month period for construction of a standard base station while Part 22 licensees have 12 months to construct an identical station.

---

[95] 47 CFR § 22.43(a)(2). Offshore telephone stations must be constructed within 18 months. *Id.*

[96] *Id.*, §§ 90.155(a) (general); 90.495(c) (900 MHz paging); 90.633(c),(d) (conventional SMR); 90.725(f) (local 220 MHz).

[97] *Id.*, §§ 90.631(e),(f).

[98] *See* ¶ 67, *infra.*

[99] 47 CFR 22.43(c)(1). Cellular licensees in areas other than the top 90 markets are subject to shorter construction periods: licensees in markets 91-734 were required to construct at least one cell and begin providing service within 18 months, while licensees authorized to construct systems in unserved areas must complete all construction and begin providing service within 12 months. *Id.*, § 22.43(c)(2).

[100] *Id.*, § 90.725(a).

[101] *See Broadband PCS Order*, ¶ ¶ 132-134. Similarly, our narrowband PCS rules require licensees to cover a specified minimum area or otherwise provide coverage to 37.5% of the population in their service areas within five years, and to cover a larger minimum area or reach 75% of the service area population within 10 years. *See Narrowband PCS Reconsideration Order*, ¶ ¶ 31-32.

[102] 47 CFR §§ 90.629. Prior to 1993, extended implementation under this rule was available only to non-SMR licensees and was limited to three years. Beginning in 1991, however, the Commission granted several waiver requests by SMR licensees for extended construction periods of up to five years to build wide-area systems. *See, e.g.*, Fleet Call, Inc., 6 FCC Rcd 1533 (1991). Finally, in PR Docket 92-210, the Commission extended the applicability of to SMR applicants and increased the maximum allowable construction period from three to five years. *Report and Order*, Amendment of Part 90 of the Commission's Rules Governing Extended Implementation Periods, PR Docket No. 92-210, 8 FCC Rcd 3975 (1993).

[103] *900 MHz PCP Exclusivity Order*, ¶ 23. Several parties have sought reconsideration of the procedures established in the *900 MHz PCP Exclusivity Order* for obtaining extended construction authority in the 929-930 MHz band. We intend to proceed with reconsideration of the *Order* independently of the present rule making. As discussed further below, however, we also seek comment in the present rule making on whether our construction rules should be revised for wide-area paging services generally. *See* ¶ 66, *infra.*

[104] 47 CFR § 22.527(b)(5).

We therefore propose to adopt a uniform 12-month construction period for CMRS licensees under both Part 22 and Part 90 except in those services where a longer time period is specifically authorized. We seek comment on this approach, which would apply, *inter alia*, to conventional and trunked SMR, paging, Business Radio, and local 220 systems. In addition, although such a step is not required to achieve comparable regulation of CMRS, we seek comment on whether the 12-month construction period should also be extended to PMRS licensees under Part 90. Rather than maintain the existing 8-month limit for some Part 90 licensees and not others, adopting a uniform period would arguably enhance administrative efficiency and simplicity in our regulation of all mobile services.

63. We further propose to require that licensees not only complete construction but also commence service by the end of this period. Part 90 currently requires stations to be constructed and "in operation" at the expiration of the construction period.[105] At least one mobile as well as one base station must be placed in operation to meet this requirement, except that trunked systems must have two operational mobiles (or one mobile and one control station).[106] Under Part 22, cellular licensees must provide "service to the public" by the end of the relevant construction period, but Public Land Mobile stations are required only to be constructed and "ready for operation."[107] We propose to amend our rules to require that CMRS licensees commence service to the public by the expiration of the relevant construction period. Unless otherwise specified, commencement of service would be defined as providing service to at least two third parties unaffiliated with the licensee.

64. With respect to wide-area SMR systems that require more than 12 months to construct, we seek comment on whether we should continue to require licensees to apply for extended implementation or whether we should adopt longer construction periods that apply automatically to such systems. In the *900 MHz Phase II Notice*, for example, we proposed to establish a 10-year construction period, with construction benchmarks at the fourth and sixth years for nationwide licensees and at the second and fifth years for regional licensees.[108] We believe this continues to be a viable approach under the new regulatory regime, and seek comment on whether such a timetable for 900 MHz licensees would further the goals of the statute.

65. With respect to 800 MHz SMR, however, we note that a 10-year construction period may not be appropriate, both because of the extensive construction of wide-area systems that is already under way and because 800 MHz licensees are not currently licensed in standard Commission-defined service areas.[109] At the same time, it is clear that requiring wide-area SMR licensees to affirmatively justify their construction timetables in order to obtain an extended implementation period constitutes a burden that is not imposed on cellular and PCS licensees. Accordingly, we seek comment on whether some other form of fixed construction period is feasible. For example, under the alternatives we have advanced for wide-area licensing at 800 MHz SMR (discussed at paras. 29-34, *supra*), licensees who self-designate as wide-area SMRs would be allowed to define their own service areas but would be subject to a five-year build-out deadline. After the expiration of this period, the licensee's service area would be redefined based on actual construction while unserved portions of the licensee's original area would be reclaimed by the Commission for relicensing. This approach would be similar to our construction requirements for cellular, and would arguably fulfill the goal of comparable regulation for substantially similarservices. We seek comment on this approach.

66. We also seek comment on whether to revise our rules relating to construction of wide-area paging systems. Currently, our paging construction rules in both Part 22 and Part 90 provide for short construction periods because they are tied to the construction of individual stations rather than multi-station systems. Because many paging operators are constructing wide-area systems with multiple sites, however, adopting a longer construction period for these systems may be more efficient and practical. One alternative would be to adopt some form of extended implementation procedure for all paging services along the lines of the rules recently adopted for 929-930 MHz wide-area systems[110] or our extended implementation rules in Part 90, Subpart S.[111] Another alternative would be to move towards Commission-defined service areas for all paging services (other than services on shared channels),[112] with appropriate construction periods based on the size of the area to be served. We seek comment on these alternatives.

b. Loading Requirements

67. *Background.* To ensure that mobile service licensees make efficient use of spectrum and offer service to customers within their service area, our mobile service rules typically take one of two approaches. The first of these is service area coverage requirements, which are designed to ensure that service is available within a substantial portion of the licensee's service area by requiring the licensee's system to reach a minimum geographic area or a percentage of the service area population with a usable signal. As noted in our discussion of construction requirements above, coverage requirements of this type are typically used in conjunction with construction benchmarks in services where licensees have exclusive channel assignments over large service areas, such as cellular, 220 MHz nationwide, and PCS.[113]

68. The second approach is loading requirements, which are designed to prevent spectrum warehousing by requiring licensees to "load" their systems with a specified minimum number of users. Several Part 90 services subject to

---

[105] *Id.*, §§ 90.155(a); 90.631(e),(f); 90.633(c),(d).

[106] *Id.*, §§ 90.155(c), 90.631(f), 90.633(d).

[107] *Id.* §§ 22.43(a)(2), 22.43(c).v

[108] *See 900 MHz Phase II Notice*, ¶ ¶ 34-40. Under this proposal, nationwide licensees would be required to construct in at least 28 markets within four years, in 49 markets within six years, and in 70 markets within 10 years. Regional licensees would be required to construct facilities in 40% of their service area within two years and in all portions of their service area within five years.

[109] In the *800 MHz EMSP Notice*, we tentatively concluded that the construction period established for 220 MHz nationwide systems and proposed for 900 MHz systems should not be adopted at 800 MHz. *800 MHz EMSP Notice*, ¶ 39.

[110] *See 900 MHz Exclusivity Order*, ¶ 23; 47 CFR § 90.496. As noted above, we are proceeding separately with our reconsideration of this *Order*. *See* note 103, *supra*.

[111] *See* 47 CFR §§ 90.629.

[112] *See* ¶ 37, *supra*.

[113] *See* ¶ 60, *supra*.

reclassification as CMRS are subject to such requirements. For example, SMR licensees must meet loading requirements in order to (1) obtain exclusive use of existing channels,[114] (2) obtain additional channels,[115] (3) serve areas within 40 miles of existing stations,[116] and (4) avoid automatic cancellation of authorizations for unloaded channels at five-year renewal (this last requirement applies only to trunked SMR systems licensed on or prior to June 1, 1993).[117] Similarly, Business Radio licensees in the 470-512 MHz band must load their systems to obtain exclusivity.[118] Commercial licensees at 220 MHz and paging licensees at 929-930 MHz are not subject to loading requirements, although they must file loading reports at renewal.[119] Part 22 does not impose loading requirements, although two-way non-cellular licensees must submit studies of airtime usage, referred to as "traffic loading," in order to obtain additional channels.[120]

69. While we continue to use loading requirements in the above instances, it should be noted that we have proposed to eliminate many of these rules and that some loading requirements have previously been eliminated or streamlined.[121] In the *Part 22 Rewrite Notice*, for example, we proposed to eliminate all traffic loading study requirements based on our tentative conclusion that loading is not a reliable indicator of efficient channel usage and that these studies are burdensome for licensees to prepare and for Commission staff to evaluate.[122] Similarly, in our *800 MHz EMSP* and *900 MHz Phase II* proceedings, we have proposed to rely on construction and coverage requirements instead of loading standards for wide-area SMRs.[123] We have also relied on construction and coverage requirements and refrained from adopting loading requirements in 929-930 MHz paging and PCS.[124]

70. *Discussion.* We first seek comment on the degree to which we should continue to use loading standards as a means of ensuring efficient spectrum use by CMRS licensees.[125] As noted above, we have already proposed to do away with loading requirements for some mobile services, and we have concluded in other instances that coverage requirements and construction timetables are sufficient to ensure efficient use of spectrum. In addition, if we conclude that a Part 90 service that is subject to loading requirements is "substantially similar" to a Part 22 service that is not required to meet such requirements, the statutory principle of comparable regulatory treatment arguably mandates either eliminating loading obligations for the former service or imposing them on the latter. Between the two alternatives, we are more inclined to eliminate loading requirements than to impose them, because our experience with loading suggests that spectrum warehousing can be adequately addressed by other means. In addition, we anticipate that in services where we now have authority to select licensees by auction, the need for loading standards will be reduced because licensees will have greater incentives to make efficient use of their authorizations.[126]

71. We seek particular comment on this issue as it applies to our loading requirements for SMR licensees. To the extent that SMR systems are substantially similar to Part 22 services (or to PCS), they should arguably be subject to no loading requirements at all because such requirements are not imposed on Part 22 or PCS licensees.[127] On the other hand, if we eliminate loading criteria for SMR licensees, we seek comment on whether alternative measures are necessary to protect against spectrum warehousing. For example, we currently require SMR licensees to demonstrate loading as a condition for obtaining additional blocks of frequencies.[128] If we eliminate this requirement, an alternative would be to place an overall cap on the number of frequencies that a licensee may acquire in a single area. Another alternative would be to limit initial frequency allocations and require that the licensee construct and provide service on existing channels before it can receive additional frequencies in the same area.

72. Similar issues are raised by the "40-mile rule," which requires SMR licensees to demonstrate loading in order to place base stations at less than 40-mile intervals.[129] In the *800 MHz EMSP* and *900 MHz Phase II* proceedings, we have proposed to eliminate this restriction so that wide-area licensees may construct systems in their service areas that utilize "cellular-type" low-power stations in close proximity to one another.[130] As in the case of cellular and PCS, we would rely on construction timetables and coverage requirements instead of loading requirements to ensure efficient spectrum use. We tentatively conclude that eliminating or modifying the 40-mile rule is consistent with the statutory objectives addressed in this rule making and would enhance the ability of wide-area SMR systems to compete with other broadband services. We seek comment on this tentative conclusion, and particularly on whether

---

[114] 47 CFR §§ 90.631(a) (trunked systems); 90.633(a),(b) (conventional systems).

[115] *Id.*, §§ 90.631(c) (trunked), 90.633(e) (conventional).

[116] *Id.*, §§ 90.623(c) (conventional), 90.627(b) (trunked).

[117] *Id.*, § 90.631(b).

[118] *Id.*, § 90.313(a)(3).

[119] *Id.*, §§ 90.127(e), 90.494(e), 90.737(c).

[120] *Id.*, § § 22.16, 22.516.

[121] *See, e.g., Report and Order*, Amendment of Part 90 of the Commission's Rules Pertaining to End User and Mobile Licensing Information, PR Docket No. 92-78, 7 FCC Rcd 6344 (1992) (streamlining procedures for reporting of loading information).

[122] *Part 22 Rewrite Notice*, ¶ 16.

[123] *800 MHz EMSP Notice*, ¶ ¶ 19, 37; *900 MHz Phase II Notice*, ¶ 32 n.74.

[124] *PCP Exclusivity Order*, ¶ 26; *Narrowband PCS Order*, ¶ ¶ 36-37; *Broadband PCS Order*, ¶ 134. In our exclusive use overlay proposal in the *Reframing Notice*, however, we propose to use loading standards to identify licensees whose consent is required to designate a channel as exclusive. *See Reframing Notice*, Appendix A at 10.

[125] This proceeding does not address or propose to eliminate loading requirements currently applicable to Part 90 licensees operating non-commercial systems for internal use.

[126] *See* ¶ ¶ 119-128, *infra*.

[127] Because no loading requirements currently exist for any common carrier service, we believe this rationale applies to both traditional and wide-area SMR systems classified as CMRS. In addition, assuming we decide that SMR licensees classified as CMRS providers should not be subject to loading requirements, we seek comment on whether it is either necessary or practical to retain such requirements for SMR licensees that remain classified as PMRS.

[128] 47 CFR §§ 90.631(c), 90.633(e).

[129] *Id.*, §§ 90.623(c), 90.627(b).

[130] *See* note 123, *supra*. In the *800 MHz EMSP Notice*, we proposed to eliminate the rule with respect to EMSP systems but to retain it for traditional systems that do not elect EMSP status.

the 40-mile rule should be eliminated or modified for traditional as well as wide-area SMR systems. In the event that we eliminate the rule, however, we also seek comment on whether there should be any other restrictions or conditions on spacing of multiple SMR stations within the same region.

73. We also seek comment on whether to eliminate the automatic cancellation element of our SMR loading rules, which provides that if any channel of a trunked SMR system is not fully loaded five years from the date of initial licensing, the authorization for that channel cancels automatically.[131] In 1988, we decided that a phase-out of this rule was justified in light of increased demand for SMR service, and we therefore amended the rule so that it would not apply to licensees granted authorizations after June 1, 1993.[132] Since 1988, the SMR industry has expanded even more rapidly to the point that even applying the automatic cancellation rule to pre-June 1, 1993 licensees may no longer serve a useful purpose. We have recently received a petition from the American Telecommunications Association proposing to eliminate the rule.[133] For these reasons as well as for reasons of regulatory consistency, we propose to eliminate this element of our loading rules. We seek comment on this proposal.

c. User Eligibility

74. *Background.* The historical distinction between common carriage and private radio has led to entirely different approaches to user eligibility under Part 90 and Part 22. Because private radio services are dedicated to use by a defined group of eligible users, Part 90 sets forth specific limitations on who is eligible to use each service. In the case of those Part 90 services that are subject to reclassification as CMRS, these restrictions are relatively minor: the only persons not eligible to obtain service from an SMR, private paging, or 220 MHz licensee are foreign governments and their representatives;[134] Business Radio licensees also may not serve foreign governments or their representatives and are similarly restricted from serving government entities or individuals who do not have a business use for the service.[135] Nonetheless, these restrictions contrast with Part 22, which contains no user eligibility restrictions of any kind because such restrictions would conflict with the statutory obligation of all common carriers under Sections 201 and 202 of the Act to provide service upon reasonable request.

75. *Discussion.* Because Section 332(c)(1)(A) of the Act subjects all CMRS providers to the requirements of Sections 201 and 202, Part 90 licensees who are reclassified as CMRS must offer service to the public on a nondiscriminatory basis. In light of the statute, we do not believe that any potential user or class of users may or should be prohibited from obtaining service from a CMRS provider. In addition, we believe that retaining eligibility restrictions in Part 90 when no parallel restrictions exist in Part 22 would be inconsistent with Congress' goal of regulatory symmetry. We therefore propose to eliminate all user eligibility limitations applicable to CMRS providers under Part 90, so that CMRS licensees in Part 90 services may serve the public without restriction. We seek comment on this proposal.

d. Permissible Uses

76. *Background.* Both Part 90 and Part 22 contain a variety of rules relating to the uses that may be made of particular types of mobile radio systems.[136] These rules are designed primarily to ensure that such systems are used for the purpose for which they were licensed. Thus, Part 22 specifies that all mobile units must communicate with and through base stations only,[137] and prohibits the concurrent licensing of base stations for any non-common carrier purpose,[138] although incidental or emergency non-common carrier use of Part 22 facilities is allowed under some circumstances.[139] Part 22 licensees are also prohibited from providing dispatch service.[140]

77. Part 90 similarly requires mobile radio facilities to be used primarily for communication between base stations and mobile units, although other incidental or emergency uses are allowed,[141] but private land mobile stations are prohibited from providing broadcasting or common carrier service.[142] Part 90 licensees are also subject to rules requiring transmissions to be of minimum practicable duration and that communications relating to safety of life or property be given priority.[143] Finally, licensees on shared fre-

---

131 47 CFR § 90.631(b).

132 *Report and Order*, Amendment of Part 90, Subparts M and S, of the Commission's Rules, PR Docket No. 86-404, 3 FCC Rcd 1838 (1988), ¶ 67.

133 Petition for Rule Making, RM-8387, filed October 29, 1993. We incorporate the AMTA Petition into this docket. In addition, AMTA has requested that the Commission stay enforcement of the rule pending action on its petition. Request for Stay, filed October 29, 1993. We decline to implement such a general stay, but delegate authority to the Private Radio Bureau to entertain requests for temporary stay of Section 90.631(b) by SMR licensees whose authorizations would otherwise be cancelled during the pendency of this proceeding. *See* 47 CFR § 90.151. In addition, any licensee whose authorization has already been cancelled may request reconsideration within 30 days pursuant to Section 1.106(f).

134 *See* 47 CFR §§ 90.115, 90.494(a) (900 MHz Paging), 90.645 (SMR), 90.733(a) (220 MHz).

135 *See id.*, § 90.75(a). Business Radio licensees operating private carrier paging systems may serve individuals and government entities. *See Report and Order*, Amendment of the Commission's Rules to Permit Private Carrier Paging Licensees to Provide Service to Individuals, PR Docket No. 93-38, 8 FCC Rcd 4822 (1993).

136 *See generally* 47 CFR, Part 22, Subparts G and K; Part 90, Subpart N. We note that CMRS services provided over FM subcarrier channels are not subject to Part 22 rules or other rules regarding permissible uses of FM subcarrier systems. *See Second Report and Order*, ¶ 260. A variety of services may be offered through the use of FM subcarrier channels. *See id.*, ¶ 260, n.524.

137 47 CFR §§ 22.509, 22.911.

138 *Id.*, § 22.119. We have proposed to eliminate this rule in a separate proceeding. *Notice of Proposed Rule Making*, Amendment of Part 22 of the Commission's Rules to Delete Section 22.119 and Permit the Concurrent Use of Transmitters in Common Carrier and Non-Common Carrier Services, CC Docket No. 94-46, FCC 94-113, adopted May 13, 1994, (to be released).

139 *Id.*, §§ 22.210, 22.308.

140 *Id.*, §§ 22.529, 22.911. We intend to consider whether the dispatch prohibition should be retained or eliminated in an upcoming proceeding.

141 47 CFR §§ 90.419 (general rule), 90.645 (SMR), 90.733 (220 MHz). Part 90 stations may generally transmit communications related to emergencies, civil defense, or imminent safety concerns. *See id.*, §§ 90.405, 90.407, 90.411, 90.417(a).

142 *Id.*, § 90.415.

143 *Id.*, §§ 90.403(c),(d).

quencies may only transmit communications that are directly related to the activity that renders them eligible for a station license.[144]

78. *Discussion.* Although the rules on permissible uses of Part 90 and Part 22 systems are similar in some respects (*e.g.*, restrictions on fixed base-to-base communications), some of these rules appear to require modification to conform to the new regulatory structure and ensure comparable regulatory treatment of similar services. For example, the prohibition on provision of common carrier service by Part 90 licensees is clearly inappropriate for licensees that have been reclassified as CMRS providers under the statute and therefore will be treated as common carriers. We have also concluded in the *Second Report and Order* that certain mobile service providers should have the flexibility to offer both commercial and private service under a single license.[145] We therefore propose to eliminate the Part 90 prohibition on common carrier service as it applies to SMR, 220 MHz, Business Radio, and Part 90 paging services.

79. We also seek comment on whether other rules related to permissible communications are any longer relevant under the revised regulatory regime for mobile services. For example, we see no reason why Part 90 CMRS licensees should be subject to limits on the purpose of communications on their systems when such restrictions are not imposed on Part 22 licensees and appear to be inconsistent with the requirement that CMRS providers provide non-discriminatory service to the public.[146] Similarly, the limit on the duration of messages in Part 90 services has no Part 22 counterpart and could be an impediment to competition by Part 90 CMRS licensees with substantially similar Part 22 services. We therefore propose to eliminate these restrictions as they apply to Part 90 CMRS providers, except that we propose to retain the limit on message duration in the case of systems on shared spectrum because the rule helps to assure that all co-channel licensees have the maximum possible access to air time. We seek comment on these proposals and on any other possible changes that we should consider to our rules in this regard.

e. Station Identification

80. *Background.* Both Part 22 and Part 90 generally require licensees to transmit station call signs at regular intervals. Stations in the Public Land Mobile Service must transmit their call signs every 30 minutes unless such transmission would interrupt message traffic.[147] Licensees may also identify themselves by means of a telephone number or other designation in lieu of the station call sign.[148] Part 90 requires station identification with every transmission or at 15 minute intervals during continuous traffic,[149] except in the case of trunked SMR and local 220 MHz stations, which must identify themselves at 30 minute intervals.[150] Part 90 licensees may not use an alternative designation, although licensees on exclusive channels may transmit their call signs digitally.[151] Finally, cellular licensees are exempt from all station identification requirements,[152] as are 220 MHz nationwide licensees.[153]

81. *Discussion.* Station identification rules are often necessary to ensure that both the Commission and other spectrum users can identify sources of interference. We have determined that station identification is not necessary in the case of cellular and nationwide 220 MHz systems, however, because licensees operating on exclusive channel blocks on a nationwide basis or in defined regions (*e.g.*, MSAs, RSAs) are readily identifiable through the Commission's licensing records or other publicly available information. We ask comment on whether station identification requirements for other mobile services should be eliminated on similar grounds. For example, there appears to be no need to require 900 MHz paging systems that have nationwide exclusivity to transmit their call signs. Similarly, eliminating the requirement may be feasible in the 900 MHz SMR band if we proceed with exclusive licensing in Commission-defined areas. In other services, however, station identification requirements may continue to be necessary because multiple licensees occupy common frequencies within a given geographic area (as is the case in the 800 MHz SMR band) and service areas are station-defined, making licensee identification by other means more difficult. We seek comment on this view.

82. To the extent that we conclude that station identification requirements continue to be necessary, we seek comment on whether other steps could be taken to make the requirement less burdensome without compromising its effectiveness in identifying sources of interference. For example, Part 22 paging and radiotelephone licensees and Part 90 paging and SMR licensees with multiple stations in their systems currently must identify each station by its individual call sign. In the *Part 22 Rewrite Notice*, we proposed to relax our Part 22 rules to allow licensees to use a single call sign for all stations in a system.[154] We have made a similar proposal for 800 MHz wide-area systems in the *800 MHz EMSP Notice*.[155] Accordingly, we propose to adopt a general rule that CMRS licensees operating multiple station systems may use a single call sign on a system-wide basis.[156] We also seek comment on whether all CMRS licensees on exclusive frequencies should be permitted to transmit call signs digitally, as is currently provided in Part 90.

f. General Licensee Obligations

83. Both Part 22 and Part 90 contain a variety of rules describing the general operational responsibilities of the licensee. These include rules on licensee management and

---

144 *Id.*, § 90.405(a).

145 *Second Report and Order*, ¶ 115.

146 We note that the *Reframing Notice* proposes to eliminate Section 90.405, relating to permissible communications, in its entirety. *Reframing Notice*, Appendix E.

147 47 CFR § 22.213(a).

148 *Id.*, § 22.213(b)(1).

149 *Id.*, § 90.425(a).

150 *Id.*, §§ 90.647(b), 90.735.

151 *Id.*, §§90.647(c), 90.745(d).

152 *Id.*, § 22.910.

153 *Id.*, § 90.425(d)(8).

154 *Part 22 Rewrite Notice*, Appendix A, proposed Section 22.313.

155 *800 MHz EMSP Notice*, ¶ 31.

156 The National Association for Business and Educational Radio (NABER) has specifically requested adoption of such a rule change with respect to private carrier paging systems. Letter from David Weisman to Ralph Haller, May 16, 1994. We incorporate NABER's request into the record and will address it as part of this proceeding.

control of station facilities,[157] posting of station licenses,[158] station inspections,[159] and responses to official communications.[160] On the whole, these rules appear to be quite similar, although minor variations between Part 90 and Part 22 exist. We therefore propose to retain these rules with minor modifications to eliminate inconsistency and redundancy.[161] We seek comment on this approach, and on whether there are any other rules of this type that require revision to comply with the statutory goal of comparable regulation for substantially similar services.

g. Equal Employment Opportunities

84. *Background.* Under Part 22, all common carrier licensees and permittees are subject to the Commission's equal employment opportunity (EEO) rules, which require licensees to afford equal employment opportunities to all qualified persons regardless of race, color, religion, or national origin, to establish and maintain an EEO program and to file a report on the program with the Commission (licensees with fewer than 16 full-time employees are exempt from filing the report), to post EEO notices and take affirmative steps to recruit minority and female employees, to adopt nondiscriminatory practices in job placement, advancement, attainment of seniority, pay, fringe benefits, and overtime, and to submit an annual report to the Commission reporting any EEO complaints filed against the licensee.[162] In addition, the rules require Part 22 licensees to retain EEO-related information for two years and make such information available for public inspection.[163] Part 90 licensees, on the other hand, are not subject to Commission-mandated EEO requirements of any kind.

85. *Discussion.* Our adoption of EEO rules in Part 22 was intended to ensure that all common carrier mobile radio licensees would be subject to specific EEO obligations as a condition of operation. Because Section 332 mandates that all CMRS providers are to be treated as common carriers under the Act, we believe that equivalent EEO requirements must now be extended to Part 90 licensees who are reclassified as CMRS providers. We also believe that uniform application of EEO rules to all CMRS providers is consistent with the principle of regulatory symmetry that underlies the statute. We therefore propose to apply the same EEO requirements to Part 90 CMRS licensees that are currently applicable to Part 22 licensees. We recognize that the imposition of these requirements will impose additional recordkeeping and reporting requirements on reclassified licensees, particularly those that are small businesses. We therefore ask whether the current exemption from filing requirements for licensees with fewer than 16 employees provides sufficient flexibility for small business licensees that would be newly subject to EEO rules, or whether other criteria should also be considered in deciding whether EEO reporting requirements should be imposed.

D. CMRS Spectrum Aggregation Limit[164]

86. *Background.* As a result of our decisions in the PCS docket and the reclassification of formerly private services as CMRS in the *Second Report and Order*, the state of competition in the commercial mobile services marketplace is likely to undergo significant change in the next few years. First, we have dramatically increased the amount of spectrum available to CMRS providers. Until recently, the total spectrum allocated for terrestrial common carrier mobile services consisted of 50 MHz for cellular service and 8.74 MHz for non-cellular mobile services such as common carrier paging and IMTS.[165] With the recent allocation of 120 MHz of spectrum for licensed broadband and 2 MHz of spectrum for narrowband PCS, the amount of available spectrum for CMRS has increased by over 200 percent. In addition, over 28 MHz of spectrum is currently allocated to Part 90 services that are potentially subject to reclassification as CMRS, including 19 MHz allocated to 800 and 900 MHz SMR services.[166]

87. Second, our decisions are designed to foster the development of a diverse array of CMRS offerings, ranging from cellular-type voice service to interactive data networks to advanced paging systems. In the *Broadband PCS* proceeding, we seek to achieve this goal through the licensing of relatively large blocks of spectrum on a wide-area basis, combined with flexible technical rules that allow licensees to offer multiple services where technologically and economically feasible. We have also sought to promote flexibility and diversity in existing mobile services, *e.g.*, by allowing cellular licensees to use alternative technologies, facilitating the development of wide-area SMR systems, and encouraging technical innovation in paging services.

---

[157] Part 90 licensees are responsible for proper operation of their stations, are expected to provide observations, servicing, and maintenance by certified persons as often as is necessary, and must have and maintain control over their authorized stations. *See* 47 CFR §§ 90.403, 90.433, 90.656. Public land mobile and cellular licensees must exercise effective operational control over all mobiles on their systems, and are responsible as well for mobiles temporarily associated with their systems *See id.*, §§ 22.205, 22.912.

[158] *Id.*, §§ 22.201, 90.437.

[159] *Id.*, §§ 22.200, 90.411.

[160] *Id.*, §§ 22.302, 90.449.

[161] In the *Reframing Notice*, we proposed to delete many of these rules in Part 90 on the grounds that they are redundant or unnecessary for most private land mobile licensees. *See Reframing Notice*, Appendix E. We seek comment on whether there is any public interest reason to retain these rules in the case of Part 90 licensees who provide CMRS offerings to the public or in the case of CMRS licensees generally.

[162] 47 CFR § 22.307.

[163] *Id.*

[164] The proposal set forth below was adopted on May 19, 1994 by reconsideration on our own motion. *See* note 17, *supra*.

[165] The total allocation for non-cellular terrestrial mobile service breaks down as follows: low-band paging, 640 kHz; high-band paging, 120 kHz; UHF paging, 1 MHz; high-band IMTS, 1.08 MHz; UHF IMTS, 1.3 MHz; 454 MHz air-ground, 600 kHz; and 800 MHz air ground, 4 MHz. This estimate includes spectrum in guard bands between channels, and does not include 470-512 MHz trunked, offshore radio telephone service or any fixed services. If air-ground services are excluded, the total amount of spectrum available for non-cellular services is 4.6 MHz.

[166] The total amount of spectrum allocated to Part 90 services in which licensees are potentially subject to reclassification is 28.88 MHz, broken down as follows: 800 MHz SMR, 14 MHz; 900 MHz SMR, 5 MHz; 220 MHz, 1.55 MHz (excludes channels allocated solely for non-commercial uses); Business Radio (not including lower band paging), 420 kHz in the 150 MHz band and 6.625 MHz in the 450-470 MHz band; paging, 285 kHz below 470 MHz and 1 Mhz in the 929-390 MHz band.

88. *Discussion.* In seeking to expand and diversify the CMRS marketplace, we have recognized the potential for mobile services licensees to exert market power by aggregating large amounts of spectrum in a given geographic area. In the PCS proceeding, for example, we determined that broadband licensees should be limited to 40 MHz of PCS spectrum in any licensing area.[167] We also concluded that cellular licensees, who already have 25 MHz of spectrum in their licensing areas, should not be allowed to acquire more than 10 MHz of additional PCS spectrum in those areas where they already provide a significant amount of service. This limitation on PCS-cellular spectrum aggregation was imposed based on our determination that cellular licensees could otherwise be in a position to exercise undue market power in PCS geographic markets.[168]

89. Aside from these and other service-specific restrictions,[169] however, there is no general cap on the amount of spectrum that an entity may use to provide CMRS. We therefore seek comment on whether there is a need for such a cap. Given the flexible regulatory environment that we have created for CMRS, we believe there may be some justification for this approach. In this environment, the ability to provide a diverse array of mobile services is largely a function of how much spectrum is available for use by the licensee. We are accordingly concerned that licensees with the ability to acquire large amounts of CMRS spectrum in a given area could acquire excessive market power by potentially reducing the numbers of competing providers, not only within specific service categories but also in CMRS generally. To forestall the potentially anti-competitive consequences of spectrum aggregation in an evolving and diverse mobile services marketplace, it may be appropriate as a precaution to establish a spectrum cap that encompasses all CMRS services.

90. In raising this issue, we seek comment on how we should define the relevant product market for CMRS services. We believe that the manner in which we define the product market will have an important bearing on decisions we make regarding application of a spectrum cap. For example, in the *Second Report and Order*, we concluded that the record did not support treating all CMRS services as part of a single competitive market, although we did not rule out the possibility that such a view may be appropriate. Moreover, in this Further Notice, we have sought comment on whether particular CMRS services are competitive with one another, noting that the absence of competition may justify disparate technical and operational rules for such services. If we conclude that all CMRS services should be treated as part of a single competitive product market, then it could be argued that there is a strong basis for imposing a broad spectrum cap, applicable across all CMRS services, as a means of guarding against the exercise of undue market power in this single market. If we conclude, however, that CMRS consists of several discrete markets that do not compete with one another, it could be argued that an overarching spectrum cap is not justified because there is no danger that market power in one market will affect competition in another.

91. On the other hand, it may be advisable to consider a general cap even if we conclude that all CMRS does not constitute a single market for other purposes. For example, our analysis of whether CMRS services are "substantially similar," *supra*, turns on whether competition exists between licensees in individual service categories, *e.g.*, cellular and SMR, common and private carrier paging. For purposes of assessing the competitive effects of spectrum aggregation, however, our primary concern is that if we permit any licensee to acquire a large amount of spectrum relative to its competitors, we could potentially foreclose opportunities for others to compete in the same geographic area. Under this approach, individual CMRS services that do not compete directly with one another could arguably be viewed as sub-markets, and a licensee with sufficient spectrum in each sub-market could, as a result of its spectrum holdings, excercise market power in the general CMRS market. In addition, even if CMRS does not presently constitute a single market, the competitive structure of the marketplace may evolve over time so that CMRS licensees that offer different services now may eventually become competitors. We therefore request comment on whether the competitive consequences of allowing CMRS licensees to aggregate spectrum for multiple uses should be evaluated in the context of the CMRS industry as a whole. As we move forward with our new CMRS rules and introduce PCS into the mix of CMRS services, we intend to monitor the state of competition in the CMRS industry as a whole to ensure that along with diversity of service offerings, our rules promote competitive product and geographic markets for CMRS. Commenters are requested to comment on the state of competition in the CMRS industry generally and on the extent to which distinct product and geographic markets can be discerned.

1. General Spectrum Cap Alternatives

92. If we conclude, based on the above analysis, that some form of CMRS spectrum cap should be adopted, we tentatively conclude that the limit on spectrum aggregation should be comparable to our existing limits on broadband PCS and PCS-cellular aggregation. As a practical matter, these existing restrictions already limit aggregation by licensees in services accounting for a substantial percentage of total CMRS spectrum. Applying a comparable limit to all CMRS would prevent any nullification of the objectives of the broadband PCS and PCS-cellular aggregation limits as a result of the acquisition by PCS or cellular licensees of spectrum in the remaining portion allocated to SMR, other Part 90 services subject to reclassification as CMRS, and Part 22 non-cellular services. Similarly, the cap would place non-cellular and non-PCS licensees on a comparable footing with cellular and PCS licensees in terms of their ability to aggregate CMRS spectrum.

---

[167] *Broadband PCS Order*, ¶ 61.

[168] *Id.*, ¶ ¶ 105-106.

[169] In addition to the restriction on PCS-cellular aggregation, wireline telephone carriers are prohibited from holding a controlling interest in SMR base station licenses. *See* 47 CFR § 90.603(c). This is a service-specific eligibility restriction that would limit wirelines from acquiring SMR licenses for CMRS use. *See also* Letter from Ralph A. Haller, Chief, Private Radio Bureau, to Henry Goldberg (July 1, 1991)(indicating that non-controlling interest in an SMR license is permissible). We plan to reexamine this particular restriction on wireline participation in the SMR industry in an upcoming proceeding.

93. Based on these factors, we believe that a CMRS spectrum cap should approximate the total amount of spectrum that can be held by a single licensee under our combined broadband and narrowband PCS allocations.[170] We therefore tentatively conclude that the 40 MHz limit on broadband PCS aggregation provides a reasonable basis for calculating a general CMRS cap, but that the CMRS cap should also be adjusted upward slightly to allow reasonable flexibility for PCS licensees and other existing mobile services providers to provide both broadband and narrowband services. We seek comment on this analysis, and particularly on what limitation on CMRS spectrum aggregation would provide licensees with enough flexibility to invest in and develop a range of CMRS services without allowing any one provider to acquire a disproportionate amount of CMRS spectrum in a particular area. Commenters should consider the competitive consequences of adjusting the cap either upwards or downwards.

94. We also seek comment on whether all CMRS spectrum should be included for purposes of calculating the cap. The combination of a flexible regulatory regime and rapidly evolving technologies may enable a licensee to use a given spectrum allocation for any one of a variety of services, some of which could compete with services provided by licensees in other frequency bands. For this reason, it could be argued that any CMRS spectrum held by an individual licensee should be "counted" towards the cap regardless of the particular service being provided. On the other hand, if we do not conclude that all CMRS services should be treated as part of a single competitive product market, we may wish to differentiate among the CMRS spectrum for purposes of a spectrum cap. The basis for that differentiation might be whether a particular CMRS service shares a relevant product market with services subject to a CMRS spectrum cap. We seek comment on this analysis.

95. In particular, we note several variables that could arguably have an impact on whether particular CMRS spectrum should be counted. For example, if we conclude that certain Part 90 CMRS services are not competitive with, and therefore not "substantially similar" to, other CMRS services, it could be argued that acquisition of spectrum in these services does not raise the same competitive concerns as acquisition of CMRS spectrum in services that are competitive with one another. We therefore seek comment on whether such services should be excluded from the cap.

96. We also seek comment on whether the cap should be limited to broadband services, *i.e.*, cellular, broadband PCS, and SMR. Because these three services account for the lion's share of CMRS spectrum, it could be argued that only licensees in these services have the opportunity to acquire spectrum in amounts that could significantly affect competition. In addition, it could be argued that the manner in which CMRS spectrum is assigned to licensees should be considered in determining whether such spectrum is subject to a cap. For example, spectrum that is licensed on a non-contiguous channel-by-channel basis (*e.g.*, SMR) may impose constraints on the ability to provide an array of competitive CMRS services that do not exist where spectrum is licensed in contiguous blocks (*e.g.*, PCS). Similarly, we ask commenters to evaluate whether CMRS offered on shared spectrum, such as lower-band paging and Business Radio Service, should be included in the cap on the same basis as services provided on channels licensed on an exclusive basis. Because there are no limits to entry by CMRS providers on shared spectrum, it appears that use of shared spectrum should not adversely effect competition.

97. Aside from terrestrial CMRS, we seek comment on the treatment of satellite services in the context of a CMRS spectrum cap. We have previously indicated that certain satellite licensees offering mobile services may be regulated as CMRS.[171] We therefore ask whether any or all satellite licensees offering CMRS services should be included in a CMRS spectrum cap. Such a cap could include both space station licensees providing CMRS to end users and earth station licensees accessing capacity on a satellite system to provide CMRS. We recognize that space stations essentially operate as "bent pipes" that permit the transmission of communications signals from one earth station to another (including mobile user transceivers). Individual users must arrange for access to the space segment through a separately authorized earth station licensee, who may or may not be the space segment licensee as well. We therefore request comment as to whether a spectrum cap may be properly applied to the space segment itself or should only be applied to the earth station licensee. In addition, if satellite CMRS providers are included in a spectrum cap, should the cap be applied in the mobile satellite service bands only and not in the fixed satellite bands?

98. In addition, we solicit comment on how to measure satellite spectrum for purposes of a cap. We note that space station systems licensed by the United States must be coordinated with foreign governments. After such coordination efforts, these satellite systems may have substantially less spectrum effectively available to them after international coordination than was originally authorized by the Commission. We therefore ask commenters to consider whether we should subject satellite CMRS providers to the spectrum cap only upon completion of international coordination for the space segment they propose to use. Under this approach, licensees could be required to divest CMRS interests if they were over the cap once spectrum availability has been determined. Finally, if we conclude that mobile satellite service providers should be subject to a

---

[170] As noted above, broadband PCS licensees other than cellular entities in their own service areas are limited to 40 MHz of spectrum, while cellular licensees may combine their current 25 MHz allocation with a 10 MHz PCS block in their service areas. *See* ¶ 88, *supra*. In addition, narrowband licensees are limited to three paired or unpaired 50 kHz channels, which may total up to 300 kHz. *Narrowband PCS Order*, ¶ 34. The narrowband and broadband aggregation limits do not prohibit a single entity from being licensed up to these limits in both narrowband and broadband PCS.

[171] In the *Second Report and Order*, we indicated that to the extent a satellite space station licensee or other entity provides end users a service that meets the elements of our CMRS definition, or is the functional equivalent of CMRS, we would regulate the provision of service by the licensee or other entity as common carriage. *See Second Report and Order*, ¶ 109. *See also Notice of Proposed Rulemaking*, Amendment of the Commission's Rules to Establish Rules and Policies Pertaining to a Mobile Satellite Service in the 1610-1626.5/ 2483.5-2500 MHz Frequency Bands, CC Docket No. 92-166, 9 FCC Rcd 1094, 1132-34 (1994) (tentatively concluding that mobile satellite service above 1 GHz may be offered as CMRS).

spectrum cap, we seek comment on how to define satellite service areas given the inherently nationwide scope of satellite-delivered services.[172]

2. Application of Spectrum Cap

a. Geographic Areas

99. Assuming that we adopt a spectrum cap across a number of commercial mobile radio services or all CMRS, we seek comment on how to define the geographic service areas in which the cap would apply. One approach would be to impose the cap within MTAs, BTAs, or some other standardized geographic area, so that a CMRS licensee operating in the designated region would be limited in the amount of additional CMRS spectrum it could obtain within that region. We recognize that this proposed approach is complicated by the fact that some CMRS services are not licensed in standardized geographic areas. Nevertheless, using standardized areas for purposes of a spectrum cap appears likely to create less of an administrative burden than other approaches. We seek comment on this view, and particularly on the advantages and disadvantages of using standardized areas as opposed to alternative geographic definitions, *e.g.*, actual service areas.

100. Assuming we adopt standardized geographic areas as the basis for a spectrum cap, we seek specific comment on what area definition should be used. For example, we could apply the cap uniformly on an MTA basis or on a BTA basis. While use of an MTA standard is arguably simpler administratively, a BTA standard carries less risk of being overly restrictive in its effect on licensees. We also seek comment on whether alternatives exist for using more than one area definition, depending upon such factors as the licensing area definition used for the particular service at issue or the region of the country where the service is provided.[173] In particular, commenters are asked to address the question of what administrative rules and procedures would be required in cases in which individual CMRS licenses are held by a large number of individuals or entities.

b. Attribution Standards

1) Ownership Percentage

101. We also seek comment on the percentage ownership interest that an individual or entity should be allowed to hold in a CMRS offering before it is attributed to that entity for purposes of a spectrum cap. We tentatively propose that all CMRS ownership interests of five percent or more be attributed to the holder of such interests for purposes of a spectrum cap, while CMRS ownership intersts of less than five percent would not be considered.[174] We seek comment on whether the five percent attribution level will prevent excessive market concentration of CMRS offerings in a single entity. Commenters who believe the benchmark is too lenient or too restrictive should offer specific justifications for their position. Alternatively, we seek comment on establishing different attribution levels for specific CMRS offerings. For example, for purposes of determining whether holdings in a particular CMRS license apply toward the spectrum cap, we might consider a five percent ownership interest in a cellular entity relevant, but anything less than a 20 percent interest in a narrowband paging license irrelevant. Commenters should consider whether there is any basis for differentiating among CMRS licensees in this manner.[175]

2) Service Area Overlap

102. In addition to ownership attribution, we seek comment on what amount of geographic overlap between CMRS interests should be considered significant enough to trigger application of a spectrum cap. In the *Broadband PCS Order*, for example, we determined that a cellular entity would be subject to eligibility restrictions in any PCS service area in which the cellular entity is already licensed to serve 10 percent or more of the population.[176] We believe a similar overlap analysis should be used if a CMRS spectrum cap is implemented. Depending on the relevant geographic area that is used (*see* paras. 99-100, *supra*), we propose that a CMRS licensee serving 10 percent or more of the population in a designated area should be subject to the spectrum cap in that area for purposes of further licensing. We solicit comment on the feasibility of such an approach and on whether there is a better mechanism for triggering the application of a spectrum cap in given geographic areas. We also seek comment on whether the 10 percent benchmark is an appropriate measure for all CMRS services.

c. Designated Entities

103. Assuming that we adopt a general CMRS spectrum cap, we also ask whether the cap should apply equally to all licensees in affected services or whether we should apply a different standard for designated entities, *i.e.*, minorities and women, rural telcos, and small businesses, to ensure their full participation in the developing CMRS

---

[172] While a satellite CMRS provider may decide to limit its marketing area to a particular portion of the country, mobile satellite transceivers are technically capable of operating anywhere in the satellite's signal range. We note that it would be difficult if not impossible to monitor the movement of such units. We also expect that the majority of satellite CMRS providers will take advantage of the nationwide coverage that can be provided by space segments to provide seamless nationwide service.

[173] For example, an MTA-based standard may be more appropriate for more densely populated areas, while a BTA-based approach might facilitate the development of seamless services in rural areas where the MTAs are quite large, and an MTA-only standard might thereby unduly restrict service acquisitions in a geographic region.

[174] Our tentative proposal to use a five percent attribution standard is consistent with our PCS rules and with rules relating to ownership attribution in other contexts, such as broadcast cross-ownership and cable program access. *See Broadband PCS Order*, ¶ 61; *Narrowband PCS Reconsideration Order*, ¶ 25. *See also* 47 CFR § 73.3555 (five percent broadcast attribution standard); *Report and Order*, In the Matter of Implementation of Sections 12 and 19 of the Cable Television Consumer Protection Act of 1992 -- Development of Competition and Diversity in Video Programming Distribution and Carriage, MM Docket No. 92-265, 8 FCC Rcd 3359 (1993) (five percent standard used in cable program access rules).

[175] We observe that in the licensing of broadband PCS, an entity or individual that holds a 20 percent ownership interest in a cellular license is subject to cellular eligibility restrictions, whereas the 40 MHz cap on PCS spectrum aggregation by non-cellular entities applies to any entity that holds a five percent interest in a PCS license.

[176] *Broadband PCS Order*, ¶ 109.

market.[177] In addition, if we were to raise the spectrum limit for some or all of these designated entities, commenters should consider whether any additional regulatory measures would be necessary to ensure that no undue concentration of market power occurs as a result. We also seek comment on whether to adopt attribution standards for designated entities different from those discussed above. For example, to encourage designated entity participation in CMRS, we could allow small businesses, rural telcos, minorities and women to invest in CMRS entities at a higher level than proposed above, *e.g.*, 35 percent, without triggering the spectrum cap. We seek comment on whether such a higher attribution standard for any or all of these designed entities would further their participation in CMRS services and complement our other efforts to promote their involvement in the provision of spectrum-based services[178]

3. Other Issues

104. We also solicit comment on the application of the statutory transition period to use of a CMRS spectrum cap. Specifically, we ask whether "grandfathered" Part 90 licensees who will be treated as PMRS providers until August 10, 1996 should be subject to a CMRS spectrum cap before the expiration of the transition period. Under this approach, grandfathered licensees who exceed the cap during the transition period would be required at its conclusion to divest themselves of CMRS interests as necessary to comply with the cap. We seek comment on this proposal. If we adopt this approach, commenters should also consider whether divestiture should be required immediately upon expiration of the transition period or whether grandfathered licensees should have an additional grace period, *e.g.*, six months from the end of the transition period, in which to comply with a spectrum cap. More generally, we request comment on whether we should allow all CMRS licensees a period of time after acquiring a new license in which to divest themselves of CMRS interests in order to comply with a spectrum cap. This proposal would allow CMRS licensees to participate in competitive bidding for CMRS spectrum without first divesting themselves of sufficient CMRS interests to comply with a spectrum cap should they win an auction.

105. We seek comment on issues associated with enforcement of a spectrum cap. At a minimum, we will need to collect information from CMRS licensees concerning their ownership interests and possibly also their service areas to determine whether they are in compliance with a spectrum cap. We tentatively propose that any such data collection occur only when a CMRS licensee submits an application for (1) initial licensing or modification that would affect either the amount of spectrum or the geographic coverage authorized under the license , (2) renewal of its license, or (3) transfer of control or assignment of its license. We seek comment on this proposal. Commenters should also consider whether we need to implement any additional enforcement measures to ensure compliance with a spectrum cap.

E. Licensing Rules and Procedures

106. Finally, we turn to the issue of licensing rules for CMRS. Section 332 provides that CMRS providers are to be "treated as common carriers for purposes of [the] Act," except with respect to the provisions of Title II that have been forborne. Among other things, this means that all CMRS applications must comply with common carrier licensing procedures under Section 309 of the Act, which require applications to be placed on 30 days' public notice prior to grant and allow the filing of petitions to deny. In addition, all CMRS licensees and applicants must comply with the alien ownership restrictions in Section 310(a) and (b) of the Act.

107. A key consequence of regulatory reclassification is that these statutory requirements will apply to those existing licensees and future applicants on SMR, Business Radio, 220 MHz, or Part 90 paging frequencies who provide or propose to provide service that meets the CMRS definition. Although reclassification does not take effect until August 10, 1996 for "grandfathered" Part 90 licensees, *i.e.*, those licensed prior to August 10, 1993 or licensed on private paging frequencies, these requirements will apply to non-grandfathered CMRS licensees and new CMRS applicants under Part 90 upon the effective date of the rules adopted pursuant to this Further Notice.[179] We therefore propose the following measures to ensure that new CMRS applications under Part 90 comply with the statutory requirements for licensing of common carriers under Title III of the Act. In addition, we propose a mechanism for modifying the authorizations of existing Part 90 licensees that are subject to reclassification as CMRS upon the conclusion of this rule making or, in the case of grandfathered licensees, at the conclusion of the statutory transition period.

1. Application Forms and Procedures

108. *Background.* The Commission's current application forms and procedures in the mobile services differ depending on whether the applicant is seeking a license in a common carrier service regulated under Part 22 or a private land mobile service regulated under Part 90. All Part 22 applications are filed on Form 401 and are subject to common carrier licensing procedures, while all Part 90 applications are filed on Form 574 and are subject to private radio licensing procedures, which do not include a public notice requirement or formal petition to deny procedures. Under the new definitions of CMRS and PMRS, however, licensees in certain Part 90 services have been reclassified as CMRS while others will remain private. In addition, we are about to commence licensing of PCS under these new definitions; although PCS is presumptively to be classified as CMRS, PCS applicants will be able

---

[177] *See Second Report and Order*, Implementation of Section 309(j) of the Communications Act - Competitive Bidding, GN Docket No. 93-253, FCC 94-61 (adopted March 8, 1994, released April 20, 1994) (*Competitive Bidding Order*), ¶ ¶ 257-297.

[178] *See Competitive Bidding Order*, ¶ ¶ 229-230.

[179] The alien ownership restrictions of Section 310(a) and (b) are currently applicable to all CMRS providers, including Part 90 licensees who are otherwise grandfathered. Budget Act, § 6002(c)(2)(B). The Budget Act provides a procedure for the Commission to waive alien ownership restrictions in reclassified services for licensees with lawful alien ownership interests that existed prior to May 24, 1993. *See First Report and Order*, GN Docket No. 93-252, 9 FCC Rcd 1056 (1994). The deadline for the submission of waiver requests was February 10, 1994.

to apply to provide PMRS service as well.[180] Therefore, we must establish new application procedures that provide for proper classification of each mobile service application under the new regulatory structure.

109. *Discussion.* As the basis for our revised application procedures, we propose to adopt a single unified application form that can be used by all CMRS and PMRS applicants in all terrestrial mobile services. The proposed form (tentatively designated as Form 600), which is attached as Appendix A to this Further Notice, would supersede both Form 401 and Form 574 in those services that currently use them. The form consists of a two-page main form and a series of supplemental schedules (A through F) designed for particular mobile service categories. The main form is designed to provide the Commission with basic information regarding the identity and qualifications of the applicant and the general nature of the application. The proposed schedules seek additional administrative and technical information in specific service categories similar to the information currently provided by applicants on Form 401 and Form 574.[181]

110. We believe that redesigning our mobile service application forms in this manner has several potential advantages. First, the use of a single, streamlined form to provide basic information will simplify the application process for applicants and enable the Commission to standardize the collection of licensing data. Second, providing separate schedules for service-specific technical information will ensure that applicants do not have to provide technical information that is redundant or irrelevant to their particular service. Finally, the modular design of the proposed form and schedules should facilitate electronic filing and automated entry of licensing information in all mobile services. We seek comment on these proposals and on the specific contents of the proposed Form 600 and supplemental schedules thereto.

111. We also propose to use proposed Form 600 to determine the regulatory classification of all mobile services. The proposed main form requires each applicant to indicate the service category in which the application is made and whether the proposed service meets the three "prongs" of the statutory definition of CMRS, *i.e.*, whether the applicant's service will be (1) provided for profit, (2) interconnected to the public switched network, and (3) available to the public. Based on the information provided, we propose to classify each application as CMRS or PMRS for licensing purposes. Thus, applications in mobile service categories that were classified as PMRS by the *Second Report and Order* (*e.g.*, Public Safety, Land Transportation) will be uniformly classified as PMRS applications. Similarly, all applications in Part 22 mobile service categories will be treated as CMRS applications. In the case of SMR, 220-222 MHz, Business Radio, and Part 90 paging, however, the *Second Report and Order* provides that licensees may be classified either as CMRS or as PMRS depending on the nature of the services they provide. Therefore, applications in these service categories indicating that for-profit, interconnected service will be provided will be classified as CMRS applications subject to common carrier licensing procedures,[182] while applications indicating that the proposed service is not-for-profit or is non-interconnected will be subject to PMRS licensing procedures.[183]

112. We believe that requiring applicants to provide specific information regarding how the three prongs of the CMRS definition apply to their proposed services will help to ensure that our classification of mobile service applicants as CMRS or PMRS is accurate. First, this procedure provides an independent basis for verifying that the applicant's requested classification is consistent with the nature of the service proposed. Second, requiring specific information should act as a check against applicants attempting to misrepresent the proposed nature of their service in order to avoid CMRS classification. For example, if an applicant obtains a PMRS station class authorization by identifying its service as non-profit and then provides for-profit service, it would be in violation of its authorization and possibly subject to forfeiture, license revocation, and criminal penalties for misrepresentation.[184] We request comment on this approach.

2. Qualifying Information

113. *Background.* Our current licensing procedures require Part 22 applicants to provide certain qualifying information that is not required of Part 90 applicants. For example, because common carriers are subject to the alien ownership restrictions of Section 310(b) of the Act, Part 22 applicants must disclose any alien ownership or control.[185] In addition, Part 22 applicants must disclose whether they or any controlling party (1) has had an FCC license or permit revoked or application denied by the Commission, (2) has been found by a court to have monopolized radio communication, or (3) has been convicted of a felony.

---

[180] *Second Report and Order*, ¶ 119.

[181] Schedule A requests additional administrative information from applicants in existing Part 22 mobile services and PCS applicants. These applicants would also provide technical information on either Schedule B or C, depending on whether the service is based on individual channel assignment (*e.g.*, narrowband PCS, common carrier paging) or assignment of blocks of contiguous channels (*e.g.*, cellular, broadband PCS). Schedules D and E request administrative and technical information from applicants in Part 90 services (regardless of whether the applicant will be classified as CMRS or PMRS) as well as applicants in other private mobile services (*e.g.*, General Mobile Radio Service). Schedule F solicits antenna information from applicants whose antenna structures require FAA clearance.

[182] Because we have determined that the eligibility rules for SMR, Business Radio, private paging, and 220 MHz commercial service allow licensees to provide service "to the public" as defined in the statute, applicants in these services who meet the "for-profit" and "interconnected service" prongs of the CMRS definition are automatically deemed to meet the "service to the public" prong as well.

[183] Until August 10, 1996, all applications for private paging frequencies and applications in the SMR, Business Radio, and 220 MHz services filed by entities previously licensed in the same service as of August 10, 1993 will be treated as PMRS applications. *See Second Report and Order*, ¶ ¶ 278-284.

[184] *See* 18 U.S.C. § 1001; 47 CFR §§ 1.744(d), 1.913(d). *See also Second Report and Order*, ¶ 47.

[185] Part 90 applicants are required only to certify compliance with Section 310(a), which bars foreign governments and their representatives from holding any Commission license. *See* Form 574, Certification No.4.

114. *Discussion.* Under our proposed application procedures discussed above, all CMRS applicants, including Part 90 applicants who request CMRS station classification, will be required to disclose on Form 600 any ownership or control interest in the applicant held by an alien. This disclosure is identical to the disclosure currently required of Part 22 applicantson Form 401. In addition, the proposed form will require Part 90 CMRS applicants to disclose the same information as Part 22 applicants relating to prior license denials or revocations, felony convictions, and monopolization of radio services. We seek comment on these proposals.

3. Application Fees

115. Under our current licensing procedures, Part 22 applicants pay an application filing fee of $230 per application for cellular and $230 per transmitter for non-cellular services, while the fee for Part 90 applications is $35 per call sign.[186] The reclassification of some Part 90 services as CMRS raises the issue of whether Part 90 CMRS applicants should now be required to pay the same filing fee as Part 22 applicants. This issue is not expressly addressed by the fee schedule set forth in Section 8 of the Act, which continues to use the old common carrier and private land mobile license classifications that existed prior to Congress's amendment of Section 332. Nevertheless, we believe that the principle of regulatory symmetry and the statutory direction to treat CMRS licensees as common carriers argue strongly in favor of establishing filing fees for CMRS applicants in Part 90 services that are equivalent to the filing fees already paid by Part 22 common carrier applicants. Therefore, we propose that all CMRS applicants in Part 90 services should be required to pay the $230 common carrier application fee. We seek comment on this proposal.

4. Regulatory Fees

116. In the Budget Act, Congress added a new Section 9 to the Communications Act, which authorizes the Commission to collect annual regulatory fees from all Commission licensees to recover costs incurred in carrying out its regulatory activities.[187] Like the licensing fee schedule in Section 8 of the Act, the regulatory fee schedule in Section 9 uses traditional common carrier and private radio categories while making no specific provision for CMRS. Thus, cellular and Public Land Mobile Service licensees pay an annual fee of $60 per 1000 subscribers, while SMRs and other private land mobile licensees operating on exclusive frequencies pay $16 per license per year.[188] As in the case of application fees, we believe the Congressional mandate to achieve regulatory symmetry dictates that all CMRS licensees should pay regulatory fees on the same basis.[189] Accordingly, we propose to require Part 90 CMRS licensees to pay the same per-subscriber fee as other CMRS providers instead of the per-license fee established for private radio services.[190] We seek comment on this proposal.

5. Public Notice and Petition to Deny Procedures for CMRS Applications

117. *Background.* Section 309(b)(1) of the Act requires all applications for common carrier station authorizations (other than minor amendments excepted under Section 309(c)) to be placed on public notice for 30 days prior to grant, and Section 309(d) allows petitions to deny to be filed against such applications during the public notice period. Prior to Congress's amendment of Section 332, the uniform classification of Part 90 services as private services meant that these procedural requirements were not applicable to such services.[191] In the wake of reclassification, however, those Part 90 applications that are classifiable as CMRS must be placed on 30-days public notice and will be subject to petitions to deny.

118. *Discussion.* To implement the requirements of Section 309, we propose to amend Part 20 of our rules to apply the public notice and petition to deny procedures currently set forth in Part 22 to all CMRS applicants.[192] Such procedures would apply only to Part 90 applications for SMR, 220 MHz, Business Radio, and paging licenses that are designated as CMRS under the proposed procedures discussed above, while PMRS applications would continue to be subject to current procedures for licensing of private services. In addition to initial license applications, we propose to extend public notice and petition to deny procedures to applications for major modification or for assignment or transfer of Part 90 CMRS licenses.[193] We recognize that placing Part 90 CMRS applications on pub-

---

[186] 47 CFR §§ 1.1102 (private radio fee schedule), 1.1105 (common carrier schedule). Licensees under Part 22 also are required to pay a variety of fees associated with notification filings made with the Commission. For example, Public Land Mobile Service licensees must pay a $35 fee (per transmitter) for minor license modifications, notices of completion of construction, and reinstatement applications. *Id.*, § 1.1105 (Actions 2h, 2k, 2n). Cellular licensees must pay a $60 fee for minor license modifications. *Id.* (Action 3c). We seek comment on the question of whether the various notification and related fees applicable to common carrier services under Section 1.1105 should be extended to apply to all CMRS providers.

[187] Budget Act, § 6003(a), *codified at* 47 U.S.C. § 159. We have recently adopted a *Notice of Proposed Rule Making* to implement the regulatory fees established by the statute. *Notice of Proposed Rule Making*, MD Docket No. 94-19, FCC 94-46 (adopted March 4, 1994; released March 11, 1994), 59 Fed. Reg. 12570 (March 17, 1994). In that proceeding, we noted that some existing private radio licensees would be reclassified as CMRS providers, but did not specifically address the treatment of these licensees under the new Section 9 requirements. *See id.*, ¶ 5 n.10.

[188] *See* 47 U.S.C. § 159(g).

[189] The Commission has express authority to "add, delete, or reclassify" services in the fee schedule to reflect "changes in the nature of its services as a consequence of Commission rule making proceedings or changes in the law." 47 U.S.C. § 159(b)(3).

[190] Should we adopt any changes to our common carrier fee structure in the MD Docket 94-19, we propose to conform the CMRS fees established in this proceeding accordingly. We propose that these fees take effect in FY 1995, except that those Part 90 licensees grandfathered as private until August 10, 1996 would pay the applicable private radio fees for FY 1995 and FY 1996.

[191] Under our existing rules, applications for Part 90 licenses are not placed on public notice and may be granted at any time after initial processing. *See* 47 CFR §§ 1.953, 1.962, 90.143, 90.611, and 90.711. Petitions to deny are not authorized. *Id.*, § 1.962.

[192] *See id.*, §§ 22.27, 22.30.

[193] *See* ¶ ¶ 129-134, 141-146, *infra*.

lic notice and allowing petitions to deny is likely to lengthen the licensing process for these applicants in comparison to existing private radio procedures. We therefore seek comment on how to ensure that these changes to our procedures do not unnecessarily affect the speed and efficiency of the licensing process.

6. Mutually Exclusive Applications/Competitive Bidding

119. *Background.* Both Part 22 and Part 90 contain rules pertaining to the disposition of mutually exclusive applications. Because of differences in spectrum allocation and procedures for processing applications, mutually exclusive applications are far less frequent in Part 90 services than in Part 22 services. Part 90 services are generally licensed on a "first-come, first-served" basis, in which only conflicting applications that are filed on the same day are potentially mutually exclusive.[194] Moreover, in 800 MHz SMR, we have used waiting lists as an alternative to lotteries in resolving conflicting applications.[195] Finally, there is no mutual exclusivity among applications for Part 90 frequencies below 470 MHz because these frequencies are shared.[196] By contrast, Part 22 allows competing applications to be filed in most services up to 60 days after an initial application has been placed on public notice.[197] We have adopted first-come, first-served procedures in the licensing of unserved cellular areas, however.[198] We also proposed to extend these procedures to all Part 22 licensing in the *Part 22 Rewrite Notice*.[199]

120. Since the proposal in the *Part 22 Rewrite Notice* was made, Congress has added Section 309(j) to the Communications Act, which authorizes the use of competitive bidding to select among mutually exclusive initial applications in certain services.[200] Under this new statutory authority, we have recently adopted rules identifying those services in which auctions may be used in the future.[201] The *Competitive Bidding Order* provides that mutually exclusive initial applications in Part 22 services will be subject to competitive bidding unless specifically excluded.[202] The *Order* further provides that competitive bidding may be used in some but not all of the Part 90 service categories in which licensees are subject to reclassification as CMRS. In the case of SMR, private carrier paging, and nationwide commercial 220 MHz service, we determined that competitive bidding will be used if mutually exclusive applications are filed.[203] We deferred any decision on use of competitive bidding for licensing of local 220 MHz channels, however, until the service develops further.[204] Finally, we concluded that because Section 309(j) only authorizes competitive bidding in the case of mutually exclusive applications for "initial" licenses, we generally would not treat license modification applications as subject to competitive bidding. Nevertheless, we reserved the authority to treat applications for major modifications as "initial" applications for competitive bidding purposes on a case-by-case basis.[205]

121. *Discussion.* In the *Competitive Bidding Order*, we reached the conclusion that, as a general matter, "competitive bidding is a licensing scheme that should place licenses in the hands of the parties able to use them most efficiently."[206] We believe that this principle applies to our development of licensing procedures for CMRS. First, use of competitive bidding to select from among mutually exclusive CMRS applications should enable us to avoid the inefficiencies associated with resolving competing applications by lottery or comparative hearing. Second, we believe that competitive bidding will lead to the selection of CMRS licensees who will use the spectrum efficiently to provide service to customers. For these reasons, we tentatively conclude that competitive bidding procedures should generally be used to resolve competing CMRS applications where we have the authority to do so.

122. In reaching this tentative conclusion, we are mindful of the Commission's obligation under Section 309(j)(6) of the Act to take steps to avoid mutual exclusivity in its application and licensing procedures.[207] In keeping with this principle, we do not intend to preclude the use of first-come, first-served procedures, short filing windows, and similar procedures where appropriate to promote the public interest, *e.g.*, by reducing the likelihood of frivolous competing applications being filed. Where competing applicants are required to bid, however, the risk of frivolous applications is likely to be significantly less than under selection procedures previously used. Therefore, we believe that where we have authority to select from among mutually exclusive applications by competitive bidding, it is generally advantageous to use reasonable filing windows that allow the filing of competing applications rather than to use first-come, first-served procedures that could cause qualified applicants to be excluded from consideration.

123. Based on these tentative conclusions, we generally propose to continue the use of our current filing window procedures in Part 22 services, with some modifications, and to use competitive bidding to select a tentative licensee where mutually exclusive initial applications are filed.[208] We tentatively conclude that initial applications and certain major modifications in Part 22 services (except cellular unserved area Phase I applications) should be subject to 30-day filing windows in which competing applications may be filed. Although our current rules allow 60-day filing windows for most mutually exclusive applications, we propose to shorten this time period to 30 days because we believe this time period is adequate for competitors to file mutually exclusive applications. For cellular unserved area Phase I applications, we propose to continue using a one-

---

[194] 47 CFR §§ 1.953(a) (general), 90.495(f) (900 MHz paging), 90.611 (SMR), 90.711 (220 MHz).

[195] *Id.*, § 90.611(d).

[196] *Id.*, § 90.173(a).

[197] *Id.*, § 22.31.

[198] *Id.*, § 22.6(b)(2). First-come first-served procedures are used only in "Phase II" unserved area licensing.

[199] *Part 22 Rewrite Notice*, ¶ ¶ 9-10.

[200] 47 USC § 309(j).

[201] *Second Report and Order*, Implementation of Section 309(j) of the Communications Act - Competitive Bidding, GN Docket No. 93-253, FCC 94-61 (adopted March 8, 1994, released April 20, 1994) (*Competitive Bidding Order*).

[202] *Competitive Bidding Order*, ¶ 61.

[203] *Id.*, ¶ ¶ 29, 63-64.

[204] *Id.*, ¶ ¶ 26-28.

[205] *Id.*, ¶ ¶ 38-40.

[206] *Id.*, ¶ 5.

[207] 47 U.S.C. § 309(j)(6)(E).

[208] For an explanation of how we will treat mutually exclusive applications when one of the applications is a modification, *see* ¶ 132-133, *infra*.

day filing window because applications will be accepted on a date certain that potential applicants can determine well in advance of the filing window. For cellular unserved area Phase II applications, however, we propose to change our current first come, first served rules and apply a 30-day filing window because we see no reason to treat the licensing of Phase II applications in a manner that differs from our licensing of all other Part 22 license applications. We seek comment on these proposed procedures.

124. We also seek comment on whether we should adopt similar procedures for resolving mutually exclusive CMRS applications in Part 90 services subject to reclassification. Although we declined to alter our Part 90 first-come, first-served procedures in the *Competitive Bidding Order*, we deferred the question of whether these procedures are consistent with licensing procedures for similar Part 22 services to this proceeding.[209] In general, we believe that similar services should be subject to consistent licensing procedures that allow equal opportunity for entry. For example, it would be inconsistent in our view to require initial applicants in certain CMRS services to bid for licenses while initial applicants in competing CMRS services are not required to do so. Therefore, we seek comment on the view that we should adopt uniform procedures in Part 90 and Part 22 for disposition of mutually exclusive CMRS applications. We also seek comment on whether there are factors that may justify the use of different procedures for some Part 90 services, either because we lack the authority to use competitive bidding in the service or because amending our procedures would not be in the public interest. For example, we seek comment regarding whether it would be an appropriate public interest determination to decide that current first-come, first-served procedures for certain Part 90 services should be retained where amending such procedures would affect the availability of frequencies to PMRS as well as CMRS applicants.

125. We seek specific comment on how this analysis would apply to each Part 90 service that is subject to reclassification. For example, we noted in the *Competitive Bidding Order* that a large number of mutually exclusive applications would be likely if we were to release new spectrum in the SMR bands.[210] This appears particularly likely in the 900 MHz band if we go forward with licensing outside the 46 DFAs as proposed in the *900 MHz Phase II Notice*.[211] We therefore tentatively conclude that we should use filing windows and competitive bidding in future 900 MHz licensing.

126. We also seek comment on whether the same analysis should apply to future licensing of 800 MHz SMR frequencies. In the *800 MHz EMSP Notice*, we proposed to establish a 30-day filing window for existing licensees to apply for wide-area authorizations within their MTA/BTAs, with mutually exclusive applications designated for lottery.[212] After the initial licensing phase, we proposed that subsequent applications be processed on a first-come, first-served basis, with same-day applications treated as mutually exclusive.[213] Based on these proposals, we also tentatively concluded that the use of waiting lists would be discontinued.[214] We seek comment on whether these proposed procedures continue to be viable, particularly in light of the amount of licensing that has subsequently occurred in the 800 MHz band. We note that the viability of these procedures may in turn depend on whether we consider requests for wide-area authorizations by existing 800 MHz licensees to be "initial" applications or "modification" applications for competitive bidding purposes. If 800 MHz frequencies are already licensed to the point that wide-area licensing in this band would essentially be limited to consolidation of existing service areas, it can be argued that wide-area applications should be treated as modifications of those authorizations that should not be subject to competitive bidding. On the other hand, if there are significant opportunities for 800 MHz licensees to expand their existing service areas, it can be argued that wide-area applications should be treated as initial applications which justify the use of filing windows and competitive bidding procedures.[215] We seek comment on these alternatives and request commenters addressing this issue to provide specific information regarding current use of the 800 MHz band and the potential for future expansion.

127. With respect to 220 MHz service, we do not propose to adopt any changes to our mutual exclusivity procedures at this time. First, there appears to be no need to address this issue as it pertains to the commercial nationwide channels because licensing of these channels is essentially complete.[216] As for licensing of local 220 MHz channels, we note that any amendment of our procedures to increase opportunities for filing of mutually exclusive CMRS applications would also affect the availability of these frequencies to non-commercial PMRS applicants. Nonetheless, if there is substantial demand for local 220 MHz channels among potential CMRS providers, we seek comment on whether there are alternative procedures that would allow reasonable opportunities for CMRS applicants to file competing applications without limiting the availability of frequencies to potential PMRS applicants. We also seek comment on whether we should amend our procedures if we move to regional licensing of 220 MHz channels as requested in the SunCom Petition.[217]

128. Finally, we propose to defer the issue of mutually exclusive application procedures for 929-930 MHz paging frequencies. As noted above, we recently adopted rules to permit exclusive licensing of private paging in this band. We are now in the first phase of implementing these rules, which requires an assessment of the scope of exclusivity to be granted to existing licensees, after which we will address procedural issues relating to new licensing. In addition, we are now considering several requests for waiver and re-

---

[209] *Competitive Bidding Order*, ¶ ¶ 16-17.

[210] *Id.*, ¶ 62 n.61.

[211] In the *900 MHz Phase II Notice*, we tentatively concluded that 900 MHz licensees should be selected by lottery, but stated that we would consider using competitive bidding if Congress enacted appropriate legislation. *900 MHz Phase II Notice*, ¶ 31 n.68.

[212] *800 MHz EMSP Notice*, ¶ ¶ 23-29.

[213] *Id.*, ¶ 30.

[214] *Id.*, ¶ 30 n.52.

[215] *See* ¶ ¶ 29-34, *infra*.

[216] All 220 MHz commercial nationwide blocks have been licensed except one, which is currently the subject of a pending reconsideration proceeding stemming from a prior application denial. If the remaining nationwide block is available for relicensing at the conclusion of the reconsideration, we will adopt specific licensing procedures at that time.

[217] *See* ¶ 38, *supra*.

consideration of the new rules in the *900 MHz PCP Exclusivity* docket that will require us to address issues relating to mutual exclusivity among applications. We are concerned that addressing these issues simultaneously in multiple proceedings could cause confusion and delay for paging licensees seeking to introduce nationwide and regional service.[218] We therefore believe that these issues should be comprehensively addressed after we have completed the pending reconsideration of the *900 MHz PCP Exclusivity* docket, which will finalize our rules on the scope of exclusivity afforded to 929-930 MHz systems.[219] While we are deferring the issue for the time being, however, we emphasize that our ultimate objective is to adopt consistent licensing procedures for all CMRS paging applicants.

7. Amendment of Applications and License Modification

129. *Background.* Section 309 of the Act generally provides that major amendments to pending common carrier applications must be placed on 30 days' public notice and are subject to petitions to deny in the same manner as initial applications.[220] These requirements do not apply, however, to "minor" amendments or to certain other specified exceptions.[221] Under Part 22, the following types of amendments are considered "major" for purposes of the statute: (1) a substantial change to the technical proposals in the application, (2) an expansion of the proposed service area (*de minimus* expansions are not included), or (3) a substantial change in ownership or control.[222] With limited exceptions, such amendments are treated as initial applications, *i.e.*, they must be placed on public notice and are subject to both petitions to deny and competing applications filed within the relevant filing window.[223] All amendments not classified as "major" are considered minor and are therefore not subject to these procedures. The same rules apply to applications to modify existing licenses: modification applications that would be considered major amendments in the initial application process must be placed on public notice, while minor modifications are exempt from this requirement, although Commission approval or notification may be required.[224]

130. Because private radio applications are not subject to public notice and petition to deny procedures, amendments to private radio applications are not categorized as "major" or "minor" in the same manner as amendments to common carrier applications. Instead, our private radio rules specify that "substantial" amendments will be treated as newly filed applications for purposes of filing priority.[225] "Substantial" amendments are defined to include most changes in station frequency, bandwidth, transmitter site, antenna height, transmitter power, and similar technical changes to the application.[226] In addition, Part 90 requires private radio licensees to file a new Form 574 and receive Commission approval for most license modifications involving changes to these same technical specifications.[227]

131. *Discussion.* Under Section 309 of the Act, major amendments to CMRS applications in Part 90 services must be placed on public notice and are subject to petitions to deny in the same manner as initial applications. In addition, we believe that major amendments placed on public notice should be subject to competing applications to the extent that such procedures apply to initial applications in the same service.[228] For these purposes, we propose to apply the same definitions of "major" and "minor" amendments to Part 90 CMRS applications that are applicable to Part 22 applications. We also propose to apply the same definitions to applications to modify existing CMRS licenses in Part 90 services. Thus, CMRS modification applications that would be treated as major filings under Part 22 would be similarly treated under Part 90. In this regard, we note that the *Part 22 Rewrite Notice* proposed to revise our current Part 22 rules to define major and minor filings on a service-by-service basis.[229] We have also proposed in the *Part 22 Further Notice* to define initial applications, in the context of 931 MHz paging, as (1) applications proposing the location of a new facility more than two kilometers from any existing facility operating on the same frequency; or (2) applications proposing locations anywhere on a new frequency.[230] Assuming that we conclude that these changes should be implemented in Part 22, we seek comment on (1) whether to adopt a similar approach in the relevant Part 90 services as well and (2) whether the definitions of major and minor filings should be the same for any Part 90 and Part 22 services we may determine to be substantially similar in this proceeding.

132. We also seek comment on whether the foregoing definition of "major" filings should dictate whether auctions may be used when an application to modify an existing CMRS license is mutually exclusive with another application. As discussed above, we concluded in the *Competitive Bidding Order* that competitive bidding generally should not be used in the case of license modification applications, but we reserved the authority to treat a modification that would significantly alter a licensee's existing authorization as equivalent to an initial application for competitive bidding purposes. Because "major" CMRS modifications are treated as initial applications for purposes of public notice and acceptance of competing applications, it could be argued that they should be treated as initial applications for competitive bidding purposes as well. On

---

[218] Although we determined in the *Competitive Bidding Order* that these frequencies are auctionable, we concluded for these same reasons that consideration of specific auction rules should be deferred until we have had a chance to assess the efficacy of existing procedures in resolving mutually exclusive situations. *Competitive Bidding Order*, ¶ 67.

[219] We also note that all private paging licensees subject to reclassification as CMRS will be treated as PMRS providers until August 10, 1996, including those newly licensed during the transition period.

[220] 47 U.S.C. § 309(b). *See also* 47 CFR §§ 22.27(a),(b)

[221] 47 U.S.C. § 309(c).

[222] 47 CFR § 22.23(c).

[223] 47 CFR §§ 22.23(c), 22.27, 22.31. Major amendments are not treated as newly filed applications under some circumstances, *e.g.*, where the amendment resolves a frequency conflict with another pending application or reflects events that could not reasonably have been foreseen at the time of initial filing. *Id.*, § 22.23(g).

[224] *Id.*, §§ 22.9, 22.27(c)(1).

[225] *Id.*, § 1.918(b).

[226] *Id.*, § 1.962(c).

[227] *Id.*, §§ 90.119(a)(3), 90.135(a). Modification applications to assign or transfer control of a license are also subject to this requirement. *See* ¶ 142, *infra*.

[228] *See* ¶ ¶ 119-128, *supra*.

[229] *Part 22 Rewrite Notice*, Appendix A, proposed Section 22.123. We incorporate the comments on this issue in response to the *Part 22 Rewrite Notice* into this proceeding.

[230] *See Part 22 Further Notice*, ¶ 18.

the other hand, the legislative history of Section 309(j) states that competitive bidding is not permitted "in the case of a . . . modification of the license," without distinguishing between major and minor modifications.[231] Therefore, the better approach may be to use competitive bidding only in exceptional cases where a major modification would fundamentally alter the nature or scope of the licensee's system. We seek comment on these alternatives.

133. To the extent that we decide that modification applications should be deemed not suitable for competitive bidding in mutually exclusive situations, we tentatively conclude that first-come, first-served procedures should be used to limit the likelihood of competing applications being filed. Under this proposal, only competing applications filed on the same day as a modification application would be treated as mutually exclusive, and the grantee would be chosen by random selection or a comparative selection process. We seek comment on this proposal and on the relative merits of these alternative selection methods in such situations.

134. Finally, we seek comment on conforming our Part 90 and Part 22 procedures for processing minor CMRS license modifications that are not required to be placed on public notice. Under Part 22, licensees may make numerous minor system modifications within their service areas without prior Commission approval, provided that they notify the Commission on Form 489.[232] In the *Part 22 Rewrite Notice* and today's *Further Notice of Proposed Rule Making* in the Part 22 Rewrite docket, we have proposed to allow additional minor modifications to be made on a permissive basis and to eliminate the requirement of Commission notification in most instances.[233] By contrast, Part 90 licensees must seek prior Commission approval on a station-by-station basis for numerous technical changes to their systems.[234] We propose to conform these rules to the fullest extent practicable to allow Part 90 CMRS licensees to make permissive changes to their systems on the same basis as Part 22 licensees, particularly where such changes relate to the internal configuration of wide-area systems and do not have an impact on adjacent licensees. We seek comment on this proposal and encourage commenters to identify specific instances where our rules can be conformed in this regard.

8. Conditional and Special Temporary Authority

135. *Background.* Our existing procedures under Part 22 and Part 90 set forth somewhat different requirements for construction and temporary operation by an applicant prior to the formal grant of a license. Part 22 applicants, as common carriers, are subject to Section 309(f) of the Act, which allows the Commission to grant a special temporary authorization to operate (STA) to a common carrier applicant for up to 180 days without prior public notice under "extraordinary circumstances" where a delay in operations would seriously prejudice the public interest.[235] Under Part 22, applicants are generally prohibited from commencing construction or operating prior to the license grant.[236] An applicant may begin construction prior to the grant on a conditional basis, however, if no petitions to deny or mutually exclusive applications have been filed and the application meets certain other conditions.[237] Part 22 further specifies that requests to operate under STA may be granted without public notice if the authorization: (i) is for 60 days or less pending the filing of an application for regular service,[238] or (ii) will permit interim operation to facilitate completion of authorized construction or to provide substantially the same service as previously authorized.[239]

136. Under Part 90, there is no restriction on when an applicant may commence construction, provided that it does not begin operating prematurely in violation of the rules.[240] In addition, because Section 309(f) of the Act does not apply to private radio applicants, requirements under Part 90 for temporary operation prior to licensing are more flexible than under Part 22. First, an applicant may request to operate under an STA for up to 180 days by submitting a letter request to the Commission, and such requests are routinely granted so long as the required information is provided in the request.[241] Second, Part 90 applicants proposing to operate on frequencies that are subject to frequency coordination may operate under conditional authority for up to 180 days upon proof of coordination without being required to obtain an STA in advance.[242] Frequencies that are subject to coordination include shared frequencies below 470 MHz, all non-SMR 800 and 900 MHz frequencies (including General Category channels), and 929-930 MHz paging frequencies.

137. *Discussion.* In general, we believe that the same rules for pre-grant construction and operation should apply to CMRS applicants under both Part 22 and Part 90. With

---

231 H.R. Rep. No. 103-111 at 253.

232 47 CFR § 22.9.

233 *See Part 22 Rewrite Notice*, ¶ 17; *Part 22 Further Notice*, ¶ ¶ 7-11.

234 47 CFR § 90.135.

235 47 U.S.C. § 309(f); *see also* 47 CFR § 22.25(c).

236 47 CFR § 22.43(a)(1).

237 *Id.*, §§ 22.43(c),(d). With certain exceptions, Public Land Mobile Service applicants may commence construction 90 days after the application is placed on public notice, provided the application does not raise FAA or environmental issues. Initial cellular applicants may commence construction within 60 days of notification of tentative selection, even if a mutually exclusive application has been filed.

238 *Id.*, § 22.25(b)(2).

239 *Id.*, §§ 22.25(b)(3), 22.27(c)(2).

240 *See* 47 CFR § 1.923(a) (no construction permit required in Private Radio Services).

241 *Id.*, § 90.145. An applicant seeking temporary authority to operate on an already authorized facility may operate for up to 180 days by executing a temporary license certificate (Form 572), provided that the facility uses an antenna no more than 20 feet in height. *Id.*, § 90.175(a).

242 *Id.*, §§ 90.159(b)-(e), 90.175. *See also Report and Order*, PR Docket No. 88-567, 4 FCC Rcd 8280 (1989), *recon. denied*, *Memorandum Opinion and Order*, 7 FCC Rcd 1731 (1992); *Report and Order*, Frequency Coordination in the Private Land Mobile Radio Services, PR Docket No. 83-737, 103 FCC 2d 1093 (1986). The applicant must certify that it has filed an application with the Commission, that the proposed station is outside designated border regions and radio "quiet zones," and that the proposed station meets Commission, environmental, and aviation-safety rules. Conditional operation is also allowed for certain itinerant stations that are not subject to coordination. *See* 47 CFR § 90.175(f).

respect to pre-grant construction, therefore, we seek comment on whether the restrictions currently applicable to Part 22 applicants should be adopted for all CMRS applicants. Under these procedures, Part 90 CMRS applicants would be allowed to commence construction prior to the date of the license grant only if no petitions or mutually exclusive applications are on file and the other conditions set forth in Part 22 are met. Alternatively, we seek comment on whether CMRS licensees should generally be able to commence construction at any time, provided that they comply with relevant environmental and aviation hazard rules.

138. Even if we adopt liberal pre-grant construction rules for CMRS, however, Section 309(f) requires that a stricter standard be applied to pre-grant operation. Because Section 309(f) now applies to CMRS applications in Part 90 as well as applications under Part 22, we believe that the current Part 90 rules regarding CMRS operation under STA must be conformed to the statute and that allowing conditional CMRS operation without prior Commission approval may not be permissible. We therefore propose to adopt procedures in Part 90 that will subject STA requests by Part 90 CMRS applicants to the same requirements that are applied to similar requests by Part 22 applicants. We also propose to prohibit any commencement of operations by CMRS applicants without prior Commission authorization. We recognize that as a consequence of these proposals, the burden on Part 90 CMRS applicants seeking to commence early operations will be significantly greater than under our current rules. We therefore seek comment on whether there are ways to retain flexibility in our STA procedures while continuing to comply with the statutory requirements of Section 309(f).

9. License Term/Renewal Expectancy

139. *Background.* Part 22 currently specifies a 10-year license term for all common carrier mobile service providers. The license term for all Part 90 services is five years, except for 220 MHz nationwide licensees, who receive a ten-year license. Part 22 further provides that a cellular renewal applicant will receive a preference in a comparative renewal proceeding by demonstrating that it: (1) has provided "substantial" service during the license term, and (2) has complied with applicable Commission rules, policies, and the Communications Act.[243] Part 22 does not expressly provide for such a preference in the case of non-cellular licensees, but the Commission has applied renewal expectancy principles to other Part 22 licensees by case law that are similar but not identical to the standard applied to cellular licensees.[244] Part 90 contains no analogous rules regarding renewal expectancy.

140. *Discussion.* We propose to establish a uniform 10-year license term for all CMRS licensees, including those in Part 90 services. We also propose to extend our existing rules and case law regarding renewal expectancy to all Part 90 CMRS licensees. In our view, these modifications to our existing rules are consistent with the objective of achieving regulatory symmetry for all CMRS providers. We seek comment, however, on whether a single standard for granting a preference to renewal applicants should be applied uniformly to all CMRS services or whether alternative standards should be considered.

10. Assignment of Licenses and Transfer of Control

141. *Background.* Section 310(d) of the Communications Act provides that no construction permit or station license may be transferred, assigned, or otherwise disposed of without Commission approval based on a finding that the public interest, convenience, and necessity will be served by the transaction.[245] Accordingly, both Part 22 and Part 90 generally require prior Commission approval of any assignment or transfer of control.[246] In implementing this public interest standard, the Commission has adopted various conditions and anti-trafficking restrictions on the assignment and transfer of licenses in particular mobile services. Under Part 22, requests for license assignments and transfers of control involving non-cellular licenses (other than 800 MHz air-ground radiotelephone licenses) require a determination that the proposed assignment or transfer will not constitute trafficking or speculation unless the system has been constructed or, in the case of licenses awarded by comparative hearing, in operation for one year.[247] These requirements do not apply to requests involving *pro forma* transfers and assignments or to requests involving exclusive paging frequencies.[248] Requests for assignment or transfer of cellular licenses obtained by random selection require an affirmative showing that no speculation is involved.[249] Cellular licenses for unserved areas may not be transferred unless the system has provided service to the public for one year.[250]

---

[243] 47 CFR § 22.941(a). "Substantial" service is defined as "service which is sound, favorable, and substantially above a level of mediocre service which might just minimally warrant renewal." *Id.*, § 22.941(a)(1). *See Report and Order*, Amendment of the Commission's Rules Relating to License Renewals in the Domestic Public Cellular Radio Telecommunications Service, CC Docket No. 90-358, 7 FCC Rcd 719 (1992), *modified on recon.*, 8 FCC Rcd 2834 (1993), *further recon. pending*.

[244] In re Applications of Baker Protective Services, Inc., 59 Rad. Reg. 2d 1141 (1986). In *Baker*, we determined that a preference would be awarded to a non-cellular renewal applicant if the applicant could demonstrate that it: (1) has substantially used its spectrum for its intended purpose; (2) has complied with applicable Commission rules, policies, and the Communications Act; and (3) has not otherwise engaged in substantial, relevant misconduct.

[245] 47 U.S.C. § 310(d).

[246] *See* 47 CFR §§ 22.39(a), 90.153.

[247] 47 CFR § 22.40(a). In the case of 800 MHz air-ground radiotelephone service, applications and authorizations for unconstructed facilities cannot be assigned or transferred or be subject to any substantial change in ownership. In the case of constructed 800 MHz air-ground facilities, transfers and assignments are permissible after one year of operation. *Id.*, § 22.40(c).

[248] *Id.*, § 22.40(a).

[249] *Id.*, § 22.40(b)(1). For example, such a showing may describe changed circumstances affecting the licensee after acquisition of the authorization. *See Report and Order*, Revision and Update of Part 22 of the Public Mobile Radio Services Rules, CC Docket No. 80-57, FCC 83-476, 95 FCC 2d 769 (1983) at B46 (Appendix B was not reprinted in FCC Reports). *See also* In re Application of Bill Welch, 3 FCC Rcd 6502 (1988) (for-profit transfer of unconstructed cellular license approved where applicant demonstrated no speculation was involved). The requirement of an anti-trafficking showing does not apply where (1) the licensee is trading commensurate interests in different markets; (2) the license was obtained by random selection; or (3) the transaction is pro forma. *Id.*, §§ 22.40(b)(2), 22.920(b).

[250] *Id.*, § 22.40(b)(1). A cellular license awarded to a non-incumbent in a comparative renewal proceeding may not be transferred for three years after service is initiated. *Id.* § 22.40(b)(2).

42. Under Part 90, licensees on frequencies above 800 MHz and local 220 MHz licensees must complete system construction before transfer or assignment of the license is allowed, unless the assignment or transfer is involuntary, does not involve a substantial change in control, or is a partial assignment to an applicant proposing to create a new system or expand an existing system.[251] In the case of 220 MHz nationwide service, transfer or assignment is prohibited until the system is at least 40 percent complete.[252] Business Radio and paging licenses below 800 MHz -- which are assigned to shared frequencies -- may be transferred at any time unless the Commission determines that the transfer would not be in the public interest.

143. In addition to the above requirements, we have recently adopted anti-trafficking restrictions in the *Competitive Bidding Order* relating to licenses awarded by competitive bidding. To prevent unjust enrichment of auction winners, these rules require that up to three years after issuance of such a license, the terms of any proposed assignment or transfer must be specifically disclosed to the Commission.[253] In addition, the Commission may impose monetary penalties in the event of transfers or assignments that result in unjust enrichment to the transferring or assigning party.[254] Our action does not affect otherwise applicable restrictions on transfer or assignment of licenses, however.

144. *Discussion.* The above-described rules are designed to ensure license applicants' *bona fide* intent to construct their systems so as to actually provide service to the public. In general, we believe that a uniform standard should be adopted for assignment and transfer of CMRS licenses in both Part 90 and Part 22, with possible exceptions for certain services discussed below. We therefore propose to allow assignment or transfer of most CMRS licenses upon completion of construction and placing of the system in operation, provided that the applicant can demonstrate that the assignment or transfer will serve the public interest, convenience and necessity. We also see no reason to prohibit transfers of unconstructed licenses in circumstances where the transaction is involuntary, pro forma, or does not involve a *de facto* change in control.[255]

145. We seek comment, however, on whether CMRS licensees should be allowed to assign or transfer unconstructed licenses under other circumstances. For example, we could generally prohibit such transfers, as is currently provided for Part 90 licenses on exclusive channels, or we could apply an anti-trafficking standard to such requests, as is currently applied to Part 22 licensees other than unserved area cellular licensees. We also seek comment on whether there is any need to restrict assignment or transfer of unconstructed CMRS licenses on Business Radio or Part 90 paging frequencies below 800 MHz. As noted above, licensees on these bands are distinctive in that they operate on shared rather than exclusive frequencies. Consequently, there is little if any risk of trafficking in unconstructed licenses because any potential assignee or transferee can simply obtain its own license instead. In light of this distinction, we propose to allow transfer of unconstructed as well as constructed CMRS licenses on shared frequencies, subject to prior Commission approval.

146. Finally, we seek comment on what conditions on transfer and assignment should be placed on wide-area CMRS providers. As noted above, an unserved area cellular licensee must operate its system for one year before any transfer or assignment may occur, and a cellular license awarded to a challenger in a comparative renewal proceeding may not be transferred for three year, except in the case of involuntary or *pro forma* transfers. On the other hand, we have not imposed such restrictions on wide-area SMR, paging, or 220 MHz licensees. In the interest of comparable regulation of substantially similar services, we seek comment on whether we should adopt the same restrictions on transfer of all wide-area CMRS licenses that are currently applicable to cellular licenses. Alternatively, we seek comment on whether the disclosure and anti-trafficking rules recently adopted for licenses awarded by competitive bidding and lottery justify modifying our existing transfer and assignment restrictions.

11. Combined PMRS and CMRS Operation

147. *Background.* In the *Second Report and Order*, we concluded that mobile service providers in Part 90 services where both CMRS and PMRS operation are allowed should have the flexibility to provide both CMRS and PMRS offerings under a single license.[256] We further stated our intent to implement the same licensing procedures for these services as those established for PCS in the *Second Report and Order*.[257] Our PCS licensing procedures provide that PCS applicants who propose to offer both CMRS and PMRS will be issued a single CMRS license, but may dedicate a portion of their assigned spectrum to PMRS provided that they make a showing to the Commission sufficient to demonstrate that the proposed service is not within the CMRS definition.[258]

148. *Discussion.* As discussed in the *Second Report and Order*, we propose to apply the same licensing procedures for combined CMRS/PMRS operation in our existing mobile services that currently apply to PCS. Thus, in those Part 90 services where both CMRS and PMRS operation are allowed, applicants would be allowed to seek authority to provide both CMRS and PMRS offerings under a single authorization.[259] For licensing purposes, such applications

---

[251] *Id.*, §§ 90.609, 90.709.

[252] *Id.*, § 90.709.

[253] *Competitive Bidding Order*, ¶ ¶ 214-215. We have also adopted disclosure requirements for licensees seeking to assign or transfer authorizations obtained by lottery. *See First Report and Order*, Implementation of Section 309 of the Communications Act - Competitive Bidding, PP Docket No. 93-253, 59 Fed. Reg. 9100 (February 25, 1994).

[254] *Competitive Bidding Order*, ¶ ¶ 258-264.

[255] Part 22 provides that any change from less than 50% to 50% or more ownership in an entity shall be considered a transfer of control of that entity, and that other transfers shall be reviewed on a case-by-case basis to determine whether a transfer of control has occurred. 47 CFR § 22.39(a). We propose to apply this standard to all assignments and transfers of CMRS licenses.

[256] *Second Report and Order*, ¶ ¶ 113-115.

[257] *Id.*, ¶ 115.

[258] *Id.*, ¶ 119.

[259] We do not propose to extend this procedure to mobile service categories where only CMRS or PMRS service is allowed, however. Thus, in Part 22 services that are limited to CMRS operation and Part 90 services that are limited to PMRS operation, applicants may not seek authority to provide "combined" service.

would be treated as CMRS applications subject to public notice, petitions to deny, and the additional procedural requirements for CMRS discussed above. In addition, the applicant would be required to submit a showing with its application indicating what portion of the assigned spectrum would be dedicated to PMRS and describing the proposed PMRS offering in sufficient detail to demonstrate that it falls outside the CMRS definition. We seek comment on this proposal.

12. Conversion to CMRS Status by Existing Part 90 Licensees

149. *Background.* In addition to affecting licensing procedures for new applicants, the reclassification of certain Part 90 services as CMRS changes the regulatory status of a significant number of existing SMR, Business Radio, 220 MHz, and Part 90 paging licensees. Based on the statutory criteria that define CMRS, however, other licensees in each of these services may continue to be classified as PMRS after the conclusion of the transition period. In order to implement the reclassification of existing licensees in these services, therefore, we must apply the statutory criteria to each licensee individually. Moreover, because existing Part 90 authorizations do not identify licensees as CMRS or PMRS, a mechanism is needed for specifying each licensee's regulatory status in its authorization and our licensing data base.

150. *Discussion.* As noted above, we propose to classify Part 90 applicants as CMRS or PMRS based on the station classification requested in the application. The same method appears to apply equally well to the classification of existing licensees, except in the case of licensees on Part 90 paging frequencies. We therefore propose to identify all existing licensees in the SMR, Business Radio, and 220 MHz services as CMRS or PMRS providers based on whether the licensee's station classification authorizes for-profit, interconnected service to be provided. Where the station classification indicates that for-profit, interconnected service is being provided, we would modify the license to indicate CMRS status. Part 90 licenses bearing any other classification would continue to be treated as PMRS authorizations and would not be subject to modification. We do not propose to use this approach in the case of Part 90 paging licensees, however, because many of these licensees have been classified as "non-interconnected" under the now-superseded view that "store-and-forward" paging is not a form of interconnection. Under the broader definition of interconnection adopted in the *Second Report and Order*, we believe that all paging licensees should be presumed to be providing interconnected service regardless of their existing station classification.[260]

151. In proposing this approach, we recognize the need to ensure that our existing station classifications accurately reflect the service being provided by licensees. For example, it is not uncommon for Part 90 licensees to seek authorization to provide for-profit interconnected service even though they have no immediate plans to provide such service, because this gives them flexibility to offer such service subsequently. If we were to rely on station classification to determine regulatory status in such cases, however, licensees who are not providing for-profit interconnected service could be classified as CMRS. To address this issue, we propose that within 90 days after the date our proposed rules go into effect, Part 90 licensees may request changes to their station class designations to reflect actual operations. We request comment on this approach.

IV. PROCEDURAL MATTERS

A. Ex Parte Rules -- Non-restricted Proceeding

152. This is a non-restricted notice and comment rule making proceeding. *Ex parte* presentations are permitted except during the Sunshine Agenda period, provided that they are disclosed as provided in the Commission's rules. *See generally* 47 CFR §§ 1.1202, 1.1203, 1.1206(a).

B. Initial Regulatory Flexibility Analysis

153. As required by Section 603 of the Regulatory Flexibility Act, 5 U.S.C. § 601 *et seq.* (1981), the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the expected impact of the policies and rules proposed in this *Further Notice* on small entities. The IRFA is contained in Appendix A to this *Further Notice*. The Secretary shall cause a copy of this *Further Notice*, including the IRFA, to be sent to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act.

C. Comment Period

154. Interested persons may file comments in this proceeding on or before June 20, 1994, and reply comments on or before July 11, 1994. For filing requirements, *see generally* 47 CFR §§ 1.415, 1.419. To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments, and supporting materials. If you want each Commissioner to receive a personal copy of your comments, you must file an original and nine copies. Send comments and reply comments to the Office of the Secretary, Federal Communications Commission, Washington D.C. 20554. In addition, commenters are requested to submit courtesy copies to the Chief, Mobile Services Division, Common Carrier Bureau, 1919 M St., N.W., Room 644, Washington, DC 20554, and to the Deputy Chief, Land Mobile and Microwave Division, Private Radio Bureau, 2025 M St., N.W., Room 5202, Washington, DC 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center (Room 239) at the Commission's headquarters at 1919 M Street, N.W., Washington, D.C.

D. Further Information

155. For further information regarding this *Notice*, contact David Furth or Kathleen O' Brien Ham at (202) 634-2443 (Private Radio Bureau, Land Mobile and Microwave Division), Nancy Boocker at (202) 632-6450, or Jay Jackson at 653-5560 (Common Carrier Bureau, Mobile Services Division).

[260] Paging licensees who are designated as operating not-for-profit, internal-use systems will be classified as PMRS providers, however.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

CS Docket No. 94-48

In the Matter of

Implementation of Section 19
of the Cable Television
Consumer Protection and
Competition Act of 1992

Annual Assessment of the
Status of Competition in the
Market for the Delivery of
Video Programming

NOTICE OF INQUIRY

Adopted: May 19, 1994; **Released: May 19, 1994**

By the Commission:

Comments Due: June 29, 1994
Replies Due: July 29, 1994

Table of Contents

	Paragraph
I. Introduction	1
II. Purpose of Notice of Inquiry	6
III. Fostering Competitive Technologies and Competition in the Market for the Delivery of Video Programming	13
A. Wireless Cable	19
1) Multichannel Multipoint Distribution Service (MMDS)	19
2) Local Multipoint Distribution Service (LMDS)	26
B. Direct-to-Home Satellite Services	29
1) Direct Broadcast Satellite (DBS)	29
2) Home Satellite Dishes (HSD)	32
C. Satellite Master Antenna Television Systems (SMATV)	37
D. Local Exchange Carriers (LECs)	41
E. Cable Overbuilds	47
F. Over-the-air Television Broadcasting Service	50
G. Technological Advances	52
IV. Trends in Horizontal Ownership and Vertical Integration in the Market for the Delivery of Video Programming	55
V. Changes in Practices/Conduct of Multichannel Video Programming Vendors and Distributors Since Passage of the 1992 Cable Act	65
VI. Collection of Data for Future Reports	78
VII. Procedural Matters	90

I. INTRODUCTION

1. On October 5, 1992, Congress enacted the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act" or "Act").[1] Section 19(g) of the 1992 Cable Act directs the Commission to "beginning not later than 18 months after promulgation of the regulations required by [Section 19(c) of the 1992 Cable Act], annually report to Congress on the status of competition in the market for the delivery of video programming."[2] Because the Commission adopted regulations implementing Section 19(c) on April 1, 1993, the first report must be submitted to Congress no later than October 1, 1994.[3] Notice of Inquiry ("*NOI*") to assist in gathering the information necessary to comply with this statutory requirement.

2. As the Commission noted in the proceedings implementing the rate regulation requirements of the 1992 Cable Act, the Act generally provides that where competition is present, cable television rates shall not be subject to regulation by government, but shall be regulated by the market.[4] Indeed, the Act contains a clear and explicit preference for competitive resolution of issues where that is feasible.[5] However, where competition is absent, the Commission is to protect the interests of subscribers by ensuring that cable rates are reasonable. Thus, the provisions in the Act relating to rate regulation by the Commission and local franchising authorities are intended to provide a transitional mechanism until competition develops and consumers have adequate multichannel video programming alternatives.

3. In addition, Sections 12 and 19 of the Act are designed to foster the development of competition to cable operators by requiring that programming be made available to all multichannel video programming distributors on fair terms and conditions.[6] These sections of the Act are aimed at ensuring that large cable operators do not, through anticompetitive means, limit the ability of unaffiliated video programming vendors to secure carriage on multichannel distribution systems. Promoting the emer-

[1] Pub. L. No. 102-385, 106 Stat. (1992).
[2] Section 628(g) of the Communications Act of 1934, *as amended* (hereinafter, the "Communications Act"), 47 U.S.C. § 548(g).
[3] *See First Report and Order* in *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992*,, MM Docket No. 92-265 ("*First R&O*"), 8 FCC Rcd 3359 (1993), *recon. pending.*
[4] *Report and Order and Further Notice of Proposed ("Rate Order")*, MM Docket No. 92-266, 8 FCC Rcd 5631 (1993).
[5] 1992 Cable Act § 623(a)(2), 47 U.S.C. § 543(a)(2) ("Preference for Competition").
[6] 1992 Cable Act §§ 616, 628, 47 U.S.C. §§ 536, 548.

gence over time of effective competition by fostering the entry of alternative multichannel video programming distributors is a critical element of the regulatory framework mandated by Congress.

4. Because of the significance of the role of competition in the regulation of cable television service, this statutory reporting requirement imposes upon the Commission a responsibility to engage annually in a significant competitive analysis of the multichannel video programming market. This will enable Congress and the Commission to evaluate the effectiveness of, as well as the continued need for, the regulation of the cable industry required under the Act.

5. Thus, to comply with its statutory directive, the Commission must engage in an ongoing process of evaluating the status of competition to cable television. Accordingly, through this *NOI* we seek to gather the requisite information on the status of the competitive marketplace to prepare our first report to Congress, and to develop a substantive framework and data reference point for future annual reports.

II. PURPOSE OF THE NOI

6. We intend to prepare a preliminary analysis of the development of competition to cable television by various emerging alternative technologies. We recognize, however, that our analysis will be limited primarily to information submitted by interested parties in response to this *NOI*, to publicly available materials, and to limited further information requests from certain parties, if needed. Therefore, this *NOI* also will seek comment on appropriate methods for obtaining the information and data required to prepare future, more comprehensive reports.

7. We also seek to examine the effect that the 1992 Cable Act and our implementing rules, and effect of the changes in the multichannel video marketplace resulting from the Act and rules, have had on the entry and development of competitors in the marketplace. Accordingly, we seek comment on specific conduct and practices relating to the negotiation, sales, marketing, and carriage practices of multichannel video programming distributors, as discussed further herein.

8. The goals of this *NOI* are threefold: (1) to gather information sufficient to prepare a preliminary analysis for Congress of the current state of competition to cable provided by alternative distribution technologies; (2) to collect information on whether and the extent to which the conduct and practices of multichannel video programming vendors and distributors have changed; and (3) to identify the information required to enable the Commission to prepare more comprehensive analyses in our future reports and the appropriate means of obtaining it.

9. Specifically, we seek to establish a reference point for future comparisons of the status of the multichannel video programming marketplace by updating the information contained in Appendix G of our 1990 Cable Report to Congress with respect to horizontal ownership levels and vertical integration.[7] In addition, we seek to identify the appropriate means of analyzing the relevant programming and distribution markets, and to compile information that will be used to assess the status of effective competition in the market for the delivery of video programming.

10. We believe that the best approach for developing a complete record for such an analysis is to begin by soliciting comment on the relevant analytical scope. Thus, through this *NOI* we also ask commenters to identify and define particular issues relevant to a comprehensive competitive analysis of the multichannel video programming marketplace. Additionally, we invite comment on relevant economic methodologies that may assist the Commission in its analysis of the extent of competition and market performance in both the markets for multichannel distribution systems and video programming. More specifically, the Commission invites comments on (1) the potential usefulness of standard structure-conduct-performance analyses and complementary antitrust concepts, including relevant market definitions and market power concepts;[8] (2) the potential relevance of contestable market theory and its emphasis on entry barriers, especially sunk costs, as applied to markets for multichannel video distribution systems;[9] (3) the potential usefulness of transaction cost economics and its emphasis on specific characteristics of a business transaction that may affect the sustainability of market exchange and provide incentives for vertical integrating;[10] and (4) other economic methodologies or principles that the Commission may find useful in its competitive analysis of both the multichannel distribution system and video programming markets. Comments on the potential usefulness of econometric studies of demand and cost are also invited.

11. We recognize that the outcomes of several other ongoing Commission proceedings could affect competition in the multichannel video programming marketplace.[11] We emphasize, however, that we do not intend to consolidate any issues that may be pending in those proceedings within this inquiry. Rather, we limit the scope of this proceeding to the three goals discussed.

12. Accordingly, we solicit comment on the appropriate parameters and the specific types of information necessary to engage in our annual competitive analysis. In particular, when addressing proposals for the collection of specific information, we ask that commenters identify any resulting burdens as well as benefits to the public. Thus, we seek comment on the least intrusive means of gathering the necessary information without unduly burdening the information providers.

---

[7] *Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service*, MM Docket No. 89-600, 5 FCC Rcd 4962 (1990) ("1990 Report"); *see* ¶ ¶ 13-14, *infra*.

[8] *See, e.g.*, F. M. Scherer and David Ross, *Industrial Market Structure and Economic Performance*, 3d ed. (Boston: Houghton Mifflin, 1990), Chapter One.

[9] *See* William J. Baumol, John C. Panzar, and Robert D. Willig, *Contestable Markets and the Theory of Industry Structure* (New York: Harcourt Brace Jovanovich, 1982).

[10] *See, e.g.*, Oliver E. Williamson, *The Economic Institutions of Capitalism* (New York: The Free Press, 1985).

[11] *See, e.g.*, MM Docket No. 92-264 (re: ownership); MM Docket No. 92-265 (re: program access); MM Docket No. 93-8 (re: home shopping stations); MM Docket No. 93-21 (re: sports migration); MM Docket No. 93-25 (re: direct broadcast satellite); *see also* MM Docket No. 92-259 (re: must-carry/retransmission consent) and MM Docket No. 92-266 (re: rate regulation).

III. Fostering Competitive Technologies and Competition in the Market for the Delivery of Video Programming

13. The status of competition in the multichannel video programming marketplace has been a source of regulatory concern for some time. Section 623(h) of the Cable Communications Policy Act of 1984 ("1984 Cable Act") required the Commission to conduct a study of the cable industry's operations under the Communications Act. Based on that study, the Commission was directed to prepare and submit to Congress a report analyzing the effect on the multichannel video programming marketplace of substituting market forces for cable rate regulation.[12] The Commission released its Report on July 31, 1990.[13]

14. In the 1990 Report, the Commission concluded that the cable television industry had become increasingly concentrated and vertically integrated, thereby providing multiple system operators ("MSOs") and vertically integrated cable operators with the opportunity to pursue anticompetitive actions against programming services or competing multichannel providers. Further, the 1990 Report identified specific evidence of anticompetitive conduct.[14]

15. Thereafter, Congress enacted legislation to provide increased consumer protection and to foster the development of competition in cable television and related markets.[15] As noted above, a primary goal of the 1992 Cable Act was to promote increased competition in the delivery of cable television services. As "effective competition" develops in individual markets, as that term is defined in the 1992 Cable Act and the Commission's Rules,[16] the Commission can withdraw from the regulation of cable rates. To further this goal, it is necessary to gather information that can be used to identify the extent and growth of effective competition.

16. To gather information necessary for the report required by Section 19(g) of the 1992 Cable Act, we must define the proper focus for tracking the development of effective competition. In that regard, answers to the following questions would be helpful:

(a) Should the Commission examine competition specifically as it relates to cable, and thus define the relevant market for analysis as each existing cable franchise?

(b) Alternatively, should the Commission analyze competition in broader geographic areas, identifying the types of multichannel video programming distributors that serve particular areas and measuring the extent of their distribution and/or penetration?

(c) Are both methods appropriate?

Thus, we seek comment on how to define the relevant market for analysis (*e.g.*, franchise by franchise, state by state, or by metropolitan statistical area), and whether we should examine more than one parameter.

17. As we gather information related to competition, we aim to track its growth and development over time in our annual reports to Congress. With sufficient information, we seek to develop a visual measure such as a color-coded map of the United States that can be updated to track the growth (or decline) of effective competition.

18. For purposes of our first annual report to Congress, however, we seek to make a preliminary assessment of the status of competition at the local level in the video programming marketplace. Competition to cable television is currently provided to a limited extent by "wireless cable" systems,[17] high-power and medium-power direct broadcast satellite ("DBS") services,[18] direct-to-home satellite services, satellite master antenna television ("SMATV") systems, telephone technologies (such as video dialtone), cable overbuilds, and over-the-air television broadcasting. Through this *NOI*, we seek to determine the status of video programming choices available to consumers in a particular location. In addition, commenters are invited to address technological advances that may have an impact on the market for the delivery of video programming.

A. Wireless Cable

1) Multipoint Multichannel Distribution Service (MMDS)

19. In the 1990 Report, we noted that there were 50 or more wireless cable systems serving approximately 300,000 subscribers across the country, with "numerous additional systems planned."[19] The Wireless Cable Association estimates that there were approximately 500,000 wireless cable subscribers by the end of 1993.[20] The Commission, in the 1990 Report, identified two additional requirements essential to the continued and successful development of wireless cable as a competitive alternative to cable television systems. The first was to ensure access to programming by wireless operators on non-discriminatory terms and conditions. The second was to eliminate impediments imposed by local authorities, including attempts to impose franchising requirements on wireless operators, local land use restrictions on wireless cable reception and antennas, and local requirements limiting access to buildings.[21]

20. Since the 1990 Report, many regulatory changes have occurred, both legislatively and at the Commission. First, Congress enacted the program access provisions of the 1992 Cable Act. Issues related to changes that may have occurred in the market for distribution of video programming as a result of these provisions are addressed in

---

[12] Pub. L. No. 98-549, 98 Stat. 2780, codified in Title VI of the Communications Act of 1934, 47 U.S.C. §521 *et seq.*, § 543(h) ("Communications Act").

[13] *See* 1990 Report, *supra*.

[14] *Id.* at 5006, 5008, and 5021.

[15] *See* Preamble to 1992 Cable Act, p. 1.

[16] *See* 1992 Cable Act, Section 623(l), 47 U.S.C. § 543(l).

[17] By "wireless cable," we mean multipoint distribution ("MDS"), multichannel multipoint distribution service ("MMDS"), and local multipoint distribution service ("LMDS").

[18] For purposes of this *NOI* only, we group together both medium-power service, governed by Part 25 of the Commission's rules concerning fixed satellite service ("FSS"), and high-power DBS, governed by Part 100 of the Commission's rules. *See* 47 C.F.R. §§ 25.101 *et seq.* and 100.1 *et seq.*

[19] *See* 1990 Report at 5014.

[20] Andrew Kreig, "Wireless Cable '94 Service Predicted In 23 of 25 Top ADI TV Markets," *Spectrum*, at 1.

[21] *See* 1990 Report at 5015-5016. With respect to local regulation of access to buildings, the 1990 Report noted that in thirteen states and the District of Columbia, "mandatory access" laws existed that required mandatory access to buildings for franchised cable operators, but generally not for other multichannel video providers.

Section V of this *NOI*.[22] In addition, the Commission has recently determined that future MMDS license applications which are mutually exclusive will be subject to the competitive bidding process.[23]

21. As for access to buildings by alternative programming distributors, the 1992 Cable Act's provisions with respect to home wiring were designed to allow subscribers to utilize the wiring inside their homes with an alternative multichannel video delivery system.[24] We seek comment on the adequacy of this legislative solution, and its current impact on the development and competitiveness of wireless cable systems. To the extent that access to buildings continues to pose an impediment to competition from wireless cable operators, we ask commenters to propose recommendations to Congress that could be included in our report.

22. Moreover, since the 1990 Report, the Commission has taken steps, independent of legislation, to improve the ability of wireless cable operators to provide viable competition to cable. In General Docket Nos. 90-113 and 90-54,[25] the Commission:

a) reduced the minimum programming requirements for new Instructional Television Fixed Service ("ITFS") licensees from 20 hours per channel per week to 12 hours per channel per week for the first two years of operation;[26]

b) increased the maximum ITFS and MDS transmitter output so that signal strength would consistently reach 15 miles;[27]

c) authorized the use of signal boosters so that operators could serve areas without line-of-sight to the transmitter;[28]

d) removed ownership restrictions so that a single operator may acquire a license for both groups of four MMDS channels and also may acquire more than one Operational Fixed Service ("OFS") channel in a single market;[29]

e) eliminated time-of-day and day-of-week restrictions on ITFS programming requirements;[30]

f) permitted wireless cable operators to use channel mapping technology, which allows the wireless operator to provide uninterrupted programming on the channels it leases from ITFS licensees while also permitting the ITFS licensees to fulfill their per channel per week programming requirements;[31] and

g) adopted rules aimed at reducing the incentive for "application mills" to flood the Commission with MMDS applications.[32]

23. Moreover, the Commission has issued a *Notice of Proposed Rule Making* on whether ITFS licensees should be permitted to load all of their required programming on one of the four ITFS channels, in place of the per channel programming requirements now in place.[33] Finally, the Commission is considering adopting rules which would create a "window," which would limit the filing period for ITFS applications.[34]

24. We seek information from commenters on the status of competition from wireless cable operators, and the reasons for this level of competition. If such information is not readily available, we ask that commenters propose the appropriate means for obtaining such information. Specifically, we would like commenters to address the following questions:

(a) How many wireless cable systems currently exist and are providing service to subscribers? Where are these wireless systems located? How many compete with cable systems?

(b) How many subscribers does each wireless operator serve? What is the total estimated subscriber base for each operator? What is the basis for this estimate? How is each wireless system marketed to subscribers?

(c) In areas of competition between wireless and cable systems, what is the approximate market share of each operator? On what is this estimate based? What is the penetration of each wireless operator and each competing cable operator?[35]

(d) How many wireless systems are currently under development, and what is the projected date for initiation of service for each? How many of these developing wireless systems will directly compete with cable systems?

(e) What percentage of the service area of the developing wireless system and what percentage of the service area of the competing system will constitute the area of overlap? How many potential subscribers live within the overlap area? What is the basis for this estimate?

(f) What is the projected subscriber level for each system within one year of initiation of service? Within three years? What is the basis for this projection?

---

[22] *See* ¶ ¶ 65-71, *infra*.

[23] *Second Report and Order*, PP Docket No. 92-253, (rel. April 20, 1994), at para. 62.

[24] *See* 1992 Cable Act, Section 16(d), 47 U.S.C. 544(i).

[25] *See Private Operational-Fixed Microwave Service, Multipoint Distribution Service, Multichannel Multipoint Distribution Service, Instructional Television Fixed Service, and Cable Television Relay Service*, 5 FCC Rcd 6410 (1990).

[26] *Id.* at 6416.

[27] *Id.* at 6418.

[28] *Id.* at 6422-23.

[29] *Id.* at 6411-12.

[30] *See Private Operational-Fixed Microwave Service, Multipoint Distribution Service, Multichannel Multipoint Distribution Service, Instructional Television Fixed Service, and Cable Television Relay Service*, 6 FCC Rcd 6764, 6773-74 (1991), *recon. pending*.

[31] *Id.* at 6774.

[32] *See Parts 1, 2 and 21 of the Commission's Rules Governing the Use of Frequencies in the 2.1 and 2.5 GHz Bands*, 8 FCC Rcd 1444 (1993), *recon. pending*.

[33] *Instructional Television Fixed Service*, 8 FCC Rcd 2828 (1993).

[34] *Instructional Television Fixed Service*, 8 FCC Rcd 1275 (1993).

[35] By "penetration," we mean the actual number of subscribers as a percentage of the total number of potential subscribers. Commenters are requested to include separate figures for total penetration, and penetration within the area of overlap.

(g) What is the channel capacity of each existing and projected wireless system? What is the channel capacity of each competing cable system?

(h) How long is it likely to take for wireless cable to serve as a competitive alternative to cable? On what facts is this projection based?

(i) What impediments are there to the development of wireless cable as a competitive alternative to cable?

25. We seek comment on how the prices charged to consumers for subscriptions to wireless systems compare to prices charged by cable systems, both in general and specifically where there is competition between cable operators and wireless operators. We seek suggestions as to how the Commission can gather reliable information about consumer expenditures on cable television provided by cable systems and by wireless systems. Moreover, we seek comment on the relevance of such information to our competitive analysis.

2) Local Multipoint Distribution Service (LMDS)

26. Since the 1990 Report, another delivery system for multichannel video programming has been developed. In 1991, the Commission authorized the Suite 12 Group to provide multichannel video service in New York City using millimeter wave technology.[36] After granting this authorization, the Commission received over 900 applications accompanied by petitions for waivers from entities seeking to provide similar service. The Commission decided to institute a formal rulemaking proceeding to determine whether the 27.5 - 29.5 GHz band ("28 GHz band") should be redesignated from terrestrial point-to-point services to terrestrial point-to-multipoint services in order to accommodate multichannel video service, among other proposed uses.[37]

27. Comments received in response to the *Notice of Proposed Rulemaking* in this docket indicated widespread interest in point-to-multipoint use of the 28 GHz band for multichannel video service as well as two-way voice and data services. However, several satellite entities argued that use of the 28 GHz band by LMDS operations would cause interference with fixed satellite service. Because of the Commission's desire to accommodate all potential users of this frequency band, and because of the highly technical coordination issues involved with the proposed 28 GHz services, the Commission proposed that a negotiated rulemaking be conducted for the purpose of negotiating proposed regulations to govern this band.[38] Based on the commenters' support, the Commission has requested General Services Administration ("GSA") approval to establish a negotiated rulemaking. If approved, the parties to the negotiated rulemaking will be charged with proposing technical rules which permit sharing of the 28 GHz band. If it is determined that sharing is not possible, the Commission has stated that it will seek to develop a record to ascertain the economic growth potential of the different proposals, and to identify specific public interest concerns on which it can base its selection from among the competing proposals.

28. If the Commission ultimately concludes that the 28 GHz band may be used for LMDS, we will include LMDS in our report to Congress. However, even if the 28 GHz proceeding is not resolved prior to our report deadline, we nevertheless invite commenters to discuss the appropriate means of addressing LMDS as a potential competitor to cable in our report to Congress.

B. Direct-to Home Satellite Services

1) Direct Broadcast Satellite (DBS)

29. In our 1990 Report, the Commission estimated that DBS would begin service in three to five years. However, in late 1990, Primestar Partners ("Primestar") began offering service using an existing medium-power satellite to provide video programming. Primestar currently provides 10 channels of analog service to approximately 70,000 customers, and it expects to offer more than 70 channels when its subscribers' current receivers are replaced with digital decompression boxes.[39] Primestar expects its expanded service to be available by late summer 1994. Primestar's subscribers must use a receiving dish which is approximately 36 to 40 inches in diameter. While Primestar does not charge for the receiving dish, customers pay $100-200 for installation.

30. The arrival of high-power DBS appears imminent. General Motors/Hughes (operating as DirecTV) launched a satellite in December 1993 and expects service to begin in May or June 1994. Five of the 16 transponders on the satellite are leased to United States Satellite Broadcasting (USSB) while the remaining 11 transponders belong to DirecTV. When DirecTV launches its second satellite (scheduled for September 1994), it expects to offer 150 channels of digitally compressed video programming, which includes approximately 40 channels of pay-per-view movies and 30 channels of pay-per-view sports. USSB will offer 20 channels of digitally compressed programming on its five transponders, and also expects to begin transmitting in May or June 1994. Subscribers to high-power DBS service will use a receiving dish which is 18 inches in diameter, and will initially retail for $699 (plus $100-$200 for installation). There are seven other entities that have received construction permits from the Commission.[40] Commission rules require these permittees to make their systems operational within six years of receiving a conditional construction permit.[41] The operational deadlines for these seven permittees occur between mid-1995 and mid-1998.

---

[36] *Hye Crest Management, Inc.*, 6 FCC Rcd 332 (1991). The 27.5 - 29.5 GHz frequency band is allocated for point-to-point microwave radio common carrier service. The 28 GHz band is also allocated on a co-primary basis to fixed satellite services.

[37] *See Rulemaking to Amend Part 1 and Part 21 of the Commission's Rules to Redesignate the 27.5 - 29.5 Frequency Band and to Establish Rules and Policies for Local Multipoint Distribution Service*, 8 FCC Rcd 557 (1993), *recon. pending*.

[38] *Rulemaking to Amend Part 1 and Part 21 of the Commission's Rules to Redesignate the 27.5 - 29.5 Frequency Band and to Establish Rules and Policies for Local Multipoint Distribution Service*, 9 FCC Rcd 1394 (1994).

[39] Rich Brown, "Dishing Up Full-Power DBS," *Broadcasting & Cable*, Mar. 28, 1994, at 48.

[40] These parties are Advanced Communications Corp., Continental Satellite Corp., Direct Broadcasting Satellite Corp., Directsat Corp., Echostar Satellite Corp., Tempo Satellite, Inc., and Dominion Video Satellite, Inc.

[41] 47 C.F.R. § 100.19(b).

31. We seek information from commenters on the status of competition from both medium-power and high-power DBS services, and on the reasons for this level of competition. To the extent that information is not readily available, we ask commenters to propose the appropriate means of obtaining such information. Specifically, we would like commenters to address the following questions:

With respect to medium-power DBS service:

(a) Is the 70,000 subscriber figure current, and where are these subscribers located?

(b) How many subscribers are located in areas served by cable operators? What factors account for cable subscribers' choice to receive DBS?

(c) What is the total estimated potential subscriber base and the basis for this estimate? What is the projected subscriber level within one year, within three years, and what is the basis for these projections?

(d) What is the total estimated channel capacity of the service?

(e) Is the current installation charge an impediment to attracting subscribers? How do the prices charged for this service compare with the prices charged for cable service?

(f) Are the prices nationally uniform, or do they vary depending on the location of the subscriber? If they vary, what are the reasons for the price differentials?

(g) Are any additional companies planning to offer medium-power DBS service? If so, when will any additional service become available to subscribers?

(h) How are the services marketed? Are current marketing efforts targeted equally to potential subscribers in areas served by cable systems as well as to areas unserved by cable systems? If not, why not?

(i) How long is it likely to take for medium-power DBS to serve as a competitive alternative to cable service? What is the basis for this projection?

With respect to high-power DBS service:

(a) What is the total estimated subscriber base for each operator? What is the basis for this estimate?

(b) What is the total estimated channel capacity of each operator? What are the plans of each operator to increase the digital compression ratio from the initial ratio used at the time of launch (so as to offer more channels at a later date)?

(c) How does each operator market its services? Are current marketing efforts targeted equally to potential subscribers in areas served by cable systems as well as to areas unserved by cable systems? If not, why not?

(d) What is the projected subscriber level for each operator within one year of launch of service? Within three years? What is the basis for these projections?

(e) In what circumstances are multiple decoders required? Is the current cost of installation and equipment an impediment to attracting subscribers?

(f) How will prices charged by each operator for this service compare with the prices charged for cable service?

(g) Are prices nationally uniform, or do they vary depending upon the location of the subscriber? If they vary, what are the reasons for the pricing differentials?

(h) How long is it likely to take for this service to serve as a competitive alternative to cable? What is the basis for this projection?

2) Home Satellite Dishes (HSDs)

32. In the 1990 Report, the Commission observed that Home Satellite Dish ("HSD") use in the United States had grown from approximately 900,000 units in 1984 to roughly 2.8 million units at the time of the Report.[42] The 1990 Report observed that the growth of HSD sales stalled in 1986 upon the advent of satellite signal scrambling. Prior to scrambling, HSD sales had reached a rate of almost 750,000 per year, growing five-fold in a three year period.[43] Moreover, the 1990 Report noted that the Satellite Broadcasting and Communications Association of America ("SBCA") had advised the Commission that HSDs would provide an effective alternative to cable service because more programming is available to HSD users than to cable subscribers.[44]

33. The 1990 Report noted, however, that HSD service is considerably more expensive for subscribers than cable service, and also requires reception equipment costing $2,000 - $3,000.[45] In addition to the high cost of HSD reception equipment, the report noted that zoning regulations or physical limitations could so restrict many viewers that they would be unable to install HSDs at any price.

34. We seek information from commenters on the status of, and reasons for, competition from HSD service providers. To the extent that such information is not readily available, we ask that commenters propose the appropriate means for obtaining such information. Specifically, we would like commenters to address the following questions:

(a) What is the current number of installed HSDs, and how are HSD services marketed to subscribers? How many channels of programming are available to HSD users?

(b) Where are these HSD users located? How many HSD users live within an area served by a cable system?

---

[42] *See* 1990 Report at 5016-5017. For purposes of clarity, DBS customers, who will also use satellite dishes for reception, are not to be included in discussions or information related to such HSD users. *See* Section III(B)(1), *supra*.

[43] *Id.*

[44] *Id.* at 5016, n.1 49.

[45] *Id.* at 5017, n.150.

(c) How have costs for HSD receivers changed? Do such costs provide a barrier to subscriber use of HSDs?

(d) Have any changes in the physical size of the HSD receivers had an impact on their cost to subscribers? Has the fact that HSD receivers are now smaller in size had any effect on subscriber demand?

(e) What is the projected growth of HSD use in the next year? Three years? What is the basis for this projection?

35. In addition, we seek comment on how the prices charged to HSD users for programming compare to prices charged by cable systems. How can the Commission gather reliable information pertaining to consumer expenditures on video programming provided by cable systems and by HSD users? Moreover, how relevant is such information to our competitive analysis?

36. Finally, to what extent are local zoning or other local regulations an impediment to the development or expansion of HSDs? Is the Commission's limited preemption of such local rules adequate to encourage expansion of HSD use?.[46]

C. Satellite Master Antenna Television Systems (SMATV)

37. In 1989, the Commission determined that SMATV operators collectively served about a half million subscribers, down from a high of one million in 1987.[47] Further, we noted that the National Private Cable Association ("NPCA") claimed a potential market for SMATV operators of 17 to 22 million subscribers.[48] The 1990 Report indicated that several SMATV operators had informed the Commission that a variety of local regulations and practices had severely restricted their ability to operate and to compete.[49] SMATV operators also viewed the Commission's definition of a "cable system" as a regulatory impediment to SMATV service because it restricts their ability to expand their service beyond commonly-owned facilities separated by a public right-of-way.

38. In 1990, the Commission concluded that the "cable system" definition appropriately encompassed video distribution systems utilizing wires physically installed in public rights of way.[50] With respect to distributors that make no use of public rights of way, the Commission excluded from the definition all distributors employing wireless transmissions (such as MMDS and DBS), as well as those systems employing wired transmissions that served a single multi-unit dwelling or dwellings under common ownership, control or management.[51] SMATV systems connecting separately owned multi-unit dwellings by wire, however, were deemed "cable systems."[52]

39. We seek information from commenters on the status of, and reasons for, competition to cable operators provided by SMATV systems. To the extent that such information is not readily available, we ask that commenters propose the appropriate means for obtaining such information. Specifically, we would like commenters to address the following questions:

(a) How many SMATV systems currently exist and are providing service to subscribers? Where are these SMATV systems located? How many compete with cable systems?

(b) How many subscribers does each system serve? What is the total estimated subscriber base for each SMATV operator? How are SMATV services marketed to subscribers?

(c) In areas of competition between SMATV systems and cable systems, what is the approximate market share of each operator? On what is this estimate based? What is the penetration of each SMATV operator and each competing cable operator?[53]

(d) What is the channel capacity of each existing and projected SMATV system? What is the existing and projected future channel capacity of any competing cable system?

(e) How many SMATV systems are currently under development, and what is the projected date for initiation of service? What is the projected subscriber level for each developing system within one year, and three years, of initiation of service? What is the basis for this projection? How many of these developing SMATV systems will compete with cable systems?

40. In addition, we seek comment on how the prices charged to consumers for subscriptions to SMATV systems compare to prices charged by cable systems, both in general and specifically where there is competition between cable and SMATV operators. How can the Commission gather reliable information pertaining to consumer expenditures on cable television and on services provided by SMATV systems? Moreover, we seek comment on the relevance of such information to our competitive analysis.

---

[46] *See* 47 C.F.R. § 25.104, which preempts state and local zoning or other regulations that unreasonably differentiate between satellite receive-only antennas and other types of antenna facilities. *See also Town of Deerfield v. FCC*, 992 F.2d 420 (2d Cir. 1993)(holding that Commission cannot require parties to exhaust judicial remedies before seeking administrative relief). The Commission also has pending a petition for declaratory ruling from SBCA, filed April 16, 1991, seeking to clarify areas of uncertainty under § 25.104. 1

[47] *See* 1990 Report at 5018-5019.

[48] *Id.*

[49] *Id.* at 5019.

[50] *See Definition of a Cable Television System*, 5 FCC Rcd 7638 (1990).

[51] *Id.*

[52] In *FCC v. Beach Communications, Inc.*, 113 S. Ct. 2096 (1993), the Supreme Court found a sufficient rational basis under the Constitution's Equal Protection Clause for the 1984 Cable Act's distinction between SMATV systems that serve separately owned or co-owned multi-unit buildings, but remanded the case with respect to the appropriate standard of review. On remand, the D.C. Circuit dismissed the petition, determining that there was no basis for application of a heightened scrutiny standard. *Beach Communications, Inc. v. FCC*, No. 91-1089 (D.C. Cir.)(Oct. 22, 1993).

[53] With respect to penetration, commenters are requested to include separate figures for total penetration, and penetration within the area of overlap. *See* n.35 for definition of penetration.

D. Local Exchange Carriers (LECs)

41. In the 1990 Report, we did not include local telephone exchange carrier participation in the multichannel video marketplace in our analysis of competition, concluding that such participation was unlikely to occur in the near term.[54] Within the past four years, however, significant changes have occurred which warrant inclusion of LECs in our analysis of competition in the multichannel video marketplace.

42. LECs currently are statutorily prohibited from providing video programming directly to subscribers within their service areas.[55] However, in July 1992, the Commission adopted rules authorizing LECs to offer video dialtone service, which permits LECs to participate in the video marketplace consistent with the statutory prohibition.[56] Pursuant to this authorization, a LEC may provide the transmission path for video programming on a common carrier basis, while an unaffiliated entity supplies the programming.

43. Since adoption of the video dialtone framework, we have granted applications by different LECs for technical and market trials of video dialtone in several markets.[57] Several LECs also have filed applications for permanent commercial video dialtone service. In addition, Congress is considering legislation to repeal the telephone company-cable cross-ownership restriction,[58] and several LECs have challenged the constitutionality of the restriction in federal district courts throughout the United States.[59]

44. We recognize that many aspects of the video dialtone policy as expressed in both the *First* and *Second Report and Order* are challenged in reconsideration petitions and appeals. In addressing video dialtone in this *NOI*, we do not open any of the issues raised in CC Docket No. 87-266. We merely request information regarding video dialtone which will aid in the development of a report on competition in the multichannel video marketplace. We will not consider comments that argue the merits of matters currently on reconsideration in the video dialtone docket. We also are not consolidating this *NOI* with any aspect of the video dialtone proceeding.

45. We recognize that the outcome of this *NOI* and our report on the status of competition provided by video dialtone in the multichannel video marketplace may be affected by matters currently pending before the Commission, the courts and Congress. Consequently, we seek comment upon how we should approach and address video dialtone in the context of our report on competition. For example, commenters are asked to address the following questions:

(a) Should we seek competitive analysis information from the LECs conducting video dialtone market and technical trials? To what extent is such data proprietary or confidential?

(b) Are numbers of subscribers to a basic platform relevant to our inquiry? What other information, if any, pertaining to subscribers would aid our understanding of the competitive impact of video dialtone?

(c) Should non-video and other programming services with a video component (*e.g.*, data, text, informational) provided over the video dialtone platform be included in our analysis, or should we focus solely on video programming offerings?

(d) What type of information pertaining to program suppliers should we examine?

(e) What is the appropriate means of comparing prices charged to subscribers for video dialtone and video programming services to prices charged to subscribers for cable? What information do we need to solicit to make such a comparison and is such a comparison feasible?

46. Because video dialtone is a nascent service, we believe it premature at this juncture to seek specific subscription data. However, we invite commenters to address the following issues with respect to the development of direct competition from video dialtone providers:

(a) Has the adoption of the Commission's video dialtone policy affected the development of new programming sources? How long is it likely to take for video dialtone to serve as a competitive alternative to cable?

(b) If traditional telephone technology (twisted pair copper wiring) is utilized to deploy broadband services, is it feasible for video dialtone to serve as a competitive alternative to cable?

(c) When will technologies such as digital compression and broadband switching be readily available in the market?

E. Cable Overbuilds

47. In the context of adopting rate regulation rules and policies pursuant to the 1992 Cable Act,[60] we note that the Commission sought to design an appropriate rate regulation mechanism that would require noncompetitive systems to set rates at reasonable levels. To do this, the Commission conducted a "Competitive Survey" by selecting a random sample of cable systems from which it sought information

[54] *See* 1990 Report at 5019.

[55] Communications Act, § 613(b); 47 U.S.C. § 533(b).

[56] *Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54 - 63.58*, 7 FCC Rcd 5781 (1992), *recon. pending, appeal pending sub nom., Mankato Citizens Telephone Company v. FCC*, D.C. Cir. No. 92-1404.

[57] *See, e.g., Chesapeake and Potomac Telephone Company of Virginia*, 8 FCC Rcd 2313 (1993); *New York Telephone Co.*, 8 FCC Rcd 4325; *U.S. West Communications, Inc.*, 9 FCC Rcd 184 (1993); *Southern New England Telephone Co.*, FCC 93-473, November 12, 1993; *Rochester Telephone Co.*, DA 94-275, March 25, 1994.

[58] H.R. 3636, 103rd Cong., 1st Sess., 139 Cong. Rec. E-3114 (1993) and S. 1822, 103rd Cong., 2nd Sess., 140 Cong. Rec. 771-788 (1994).

[59] In *Chesapeake and Potomac Tel. Co. v. U.S.*, 830 F. Supp. 909 (E.D. Va. 1993), *Amended Final Order*, Civ. No. 92-1751-1 (Oct. 7, 1993), *appeal docketed*, Nos. 93-2340 and 93-2341 (4th Cir. Oct. 15, 1993), the court held Section 533(b) of the Communications Act unconstitutional as applied to Bell Atlantic within its service area.

[60] *See, e.g., Rate Order, supra.*

concerning current prices, past prices, and system characteristics.[61] The sample of cable systems included, among other systems, those that face actual competition from at least one other multichannel video service provider ("overbuilds"). For purposes of the Competitive Survey, the Commission identified forty-six cable systems that met the definition of an overbuild system.[62]

48. We seek further and more comprehensive information on overbuilds; specifically, on the status of competition from cable overbuilds and the reasons for any change in the status of cable overbuilds since both the 1992 Competitive Survey and our 1990 Report. To the extent that information is not readily available, we ask that commenters propose the appropriate means for obtaining such information. More specifically:

(a) How many cable operators face competition from cable overbuilds? How does each cable overbuild market its services to subscribers?

(b) Where are the cable overbuilds located? How many subscribers are served by each incumbent system facing such competition? How many subscribers are served by each cable overbuild?

(c) What percentage of the area served by each cable overbuild and what percentage of the area served by each incumbent cable system constitutes the area of overlap?

(d) How many potential subscribers live in the area of overlap? What is the penetration of each cable overbuild, and the penetration of each incumbent cable system, both in total service areas and in areas of overlap?

(e) How many cable overbuilds are currently authorized and unbuilt? Why are they unbuilt?

(f) What is the potential subscriber base for each cable overbuild currently under construction? What is each overbuild's projected subscriber level within one year of initiation of service? Within three years? What is the basis for this projection?

(g) What is the channel capacity of each existing and unbuilt cable overbuild? What is the present and projected future channel capacity of each competing incumbent system?

49. Pursuant to the 1992 Cable Act, a franchising authority may not grant an exclusive franchise or unreasonably refuse to award an additional competitive franchise.[63] We request comment on the following questions regarding the relationship between exclusive franchises and overbuilds:

(a) What has been the effect of the statutory prohibition against exclusive franchises? Has this encouraged entry by overbuilds?

(b) Is there a relevant distinction between a municipal cable system and an independent overbuild system?

(c) What technical or economic barriers make it difficult for an overbuild system to enter a local cable market? To what extent does the local cable franchising process work to the disadvantage of an overbuild system, notwithstanding the provisions of the 1992 Cable Act?

(d) What cost disadvantage or advantages does the overbuild system experience on entering a local cable market currently served by an existing cable system? If a cost disadvantage does exist, to what extent is it attributable to local franchising requirements, federal regulations, securing rights-of-way, or other legal or policy factors?

(e) What sales or marketing disadvantage does the overbuild system experience on entering a local cable market currently served by an existing cable system? If such disadvantages exist, how are they overcome? How long, in general, does it take to overcome such disadvantages?

F. Over-the-air Television Broadcast Service

50. Conventional over-the-air television broadcasting, depending on the particular geographic and other circumstances involved, exists as a competitor to cable service, as a supplier of programming for cable system distribution, or both. While we have concluded in our recent proceedings that over-the-air broadcasting is not, by itself, an "effective competitor" to the full range of regulated basic and cable programming service offerings,[64] we have not discounted the existence of broadcasting service, in combination with other video delivery systems, as contributing toward competition in the video distribution market. A significant proportion of the public continues to rely on over-the-air service exclusively as its source of television programming, and over-the-air stations distributed by cable continue to garner a majority of the viewing time of cable subscribers. Thus, we believe that the contribution of the over-the-air television service to the development of effective competition to cable service warrants inclusion in our analysis.

51. For purposes of this *NOI*, we seek information regarding how changes in the video marketplace are affecting the competitive relationship between cable operators and terrestrial broadcasters. We also seek comment on the degree to which broadcasting service, particularly in conjunction with multichannel distribution services, exerts a constraining influence on the market power of cable systems. Further, as we noted in the *Rate Order*,[65] traditional broadcasters may at some point, through the development of digital television compression technologies, be in a position to compete with cable systems as "multichannel" video providers through the multiplexing of several video programs on a single video channel. Digital transmission systems may also make it possible to correct a number of the reception defects, such as "ghosting" or noise, asso-

[61] On December 10, 1992, the Commission adopted an *Order*, in MM Docket No. 92-266, 8 FCC Rcd 226, which required certain selected cable system operators to provide subscriber rates and other information for their cable community units and the cable systems to which they belong.

[62] *See* Appendix E of *Rate Order*, *supra*.

[63] *See* 1992 Cable Act, § 7(a)(1), 47 U.S.C. § 541(a)(1).

[64] *See, e.g., Rate Order*, 8 FCC Rcd at 5652-5653.

[65] 8 FCC Rcd 5631, 5652-53 (1993).

ciated with conventional broadcasting. Thus, commenters are asked to provide information that will assist us in projecting how these developments will influence the competitive relationships involved.

G. Technological Advances

52. We would like commenters to address significant technological advances in the multichannel video programming arena that they believe will have a significant impact on the marketplace. For example, at what point will technologies with compression capabilities become a competitive factor in the marketplace? We seek comment on the competitive effects that compression technology may have on video distribution technologies. Specifically, what will be the effect of digitally compressed services, such as expanded programming options, multiplexed pay networks, digital stereo and near video-on-demand movies, on the marketplace?[66] What will be the competitive effects of advances in encryption technology on the provision of subscription services? What competitive effects will advanced television (ATV) and interactive services have on the video distribution marketplace?

53. We also ask commenters to identify other emerging potential providers of video programming, such as electric or other utility companies. What are the implications of the entry of such distributors on competition in the video programming marketplace?

54. In addition, we request comment on the implications for the widespread availability of video services that may arise from the combination of ongoing technological developments and existing Commission regulations. What are the implications of these technological changes for the provision of locally-produced or originated programming as compared to nationally-produced services?

IV. Trends in Horizontal Concentration and Vertical Integration in the Multichannel Video Programming Marketplace

55. In the 1992 Cable Act, Congress mandated the establishment of limits on the number of channels on a cable system that can be occupied by a video programming vendor in which a cable operator has an attributable interest, and on the number of cable subscribers a person is authorized to reach through cable systems owned by such person or in which such person has an attributable interest.[67] Congress further addressed the appropriateness of imposing limitations on the degree to which multichannel video programming distributors may create or produce video programming.[68]

56. In order to establish the ownership and channel occupancy limits mandated by Section 11 of the 1992 Cable Act, Congress directed the Commission to:

> (a) ensure that no cable operator or group of cable operators can unfairly impede the flow of video programming from the programmer to the consumer;
>
> (b) ensure that cable operators do not favor affiliated video programming vendors in determining carriage and do not unreasonably restrict the flow of video programming of affiliated video programming vendors to other video distributors;
>
> (c) take account of the market structure, ownership patterns, and other relationships of the cable industry;
>
> (d) take into account any efficiencies and other benefits that might be gained through increased ownership or control;
>
> (e) make rules and regulations that reflect the dynamic nature of the communications marketplace;
>
> (f) impose no limitations that prevent cable operators from serving previously unserved rural areas; and
>
> (g) impose no limitation that will impair the development of diverse and high quality programming.[69]

57. On September 23, 1993, the Commission implemented Section 11(c)(2) of the 1992 Cable Act by prescribing national subscriber limits and channel occupancy limits.[70] The Commission established a thirty (30) percent limit on the number of homes passed nationwide that any one entity can reach through cable systems in which such entity has an attributable interest, and adopted a forty (40) percent limit on the number of channels that can be occupied on a vertically integrated cable system by video programming vendors in which the cable operator has an attributable interest.[71] These limits were intended to promote diversity, and to encourage competitive dealings between cable programming services and cable operators and between cable programming services and competing video distributors.[72] We note that various issues pertaining to these specific limits have been raised in reconsideration petitions.[73]

---

[66] *See* Tom Kerver, "Riding on the 'Headend in the Sky,'" *Cablevision*, March 14, 1994, p. 38.

[67] *See* 1992 Cable Act, § 11(c); 47 U.S.C. § 533(f)(1); Communications Act, § 613(f)(1).

[68] *See* 1992 Cable Act, § 11(c), Communications Act, § 613(f)(1)(C); 47 U.S.C. § 533(f)(1)(C).

[69] *See* Communications Act, § 613(f)(2), 47 U.S.C. § 533(f)(2); 1992 Cable Act, § 11(c).

[70] *See Second Report and Order* in *Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992*, ("*Second Report and Order on Horizontal and Vertical Ownership Limits,*") MM Docket No. 92-264, 8 FCC Rcd 8565 (1993), *recon. pending*.

[71] To promote diversity of viewpoints, the Commission also adopted rules permitting ownership of additional cable systems, up to thirty-five (35) percent of homes passed nationwide, and allowing carriage of vertically integrated programming on forty-five (45) percent of a system's channel capacity if the system and the programming service, respectively, are minority-controlled.

[72] The Commission stayed implementation of the horizontal ownership restrictions pending judicial resolution of the U.S. District Court decision in *Daniels Cablevision v. United States* (*"Daniels"*) that the statutory imposition of horizontal restrictions is unconstitutional, 835 F. Supp. 1 (D.D.C. 1993). The *Daniels* court, however, upheld the statutory imposition of vertical restrictions. *Id.* at 12.

[73] *See, e.g., Petition for Reconsideration of Center for Media Education and Consumer Federation of America*, filed December 15, 1993, and *Petition of Bell Atlantic for Limited Reconsideration*, filed December 15, 1993, in MM Docket No. 92-264.

58. To analyze the status of competition in the multichannel video programming marketplace, we believe it will be useful to compile data that will create a baseline of the current extent of horizontal ownership by MSOs and the current level of vertical integration in the cable programming industry. An appropriate baseline will enable us to track future developments and changes in the distribution of multichannel video programming and may be particularly important given the dynamic and fluid nature of the communications marketplace.

59. As a starting point, we request that commenters provide information necessary to update the information and tables pertaining to horizontal ownership and vertical integration in the cable industry contained in Appendix G of the 1990 Report.[74] In establishing the current subscriber and channel occupancy limits of Sections 76.503 and 76.504 of the Commission's Rules, substantial reliance was placed upon the information set forth in the 1990 Report. In the *Second Report and Order on Horizontal and Vertical Ownership Limits*, the Commission noted that we will review the subscriber limitations every five years to determine whether the limits are reasonable under prevailing market conditions, and whether the limits continue to serve the objectives for which they were adopted.[75] We believe the creation of a baseline will enable us not only to provide a comprehensive report to Congress pursuant to Section 19(g) of the 1992 Cable Act, but will aid our periodic review of the appropriateness of subscriber limits in accordance with the *Second Report and Order*.

60. For purposes of submitting the following information and data in order to update the information contained in the 1990 Report, please refer to the attribution rules and definitions utilized in the Commission's rules governing horizontal and vertical ownership.[76] Commenters are requested to provide current information on:

(a) the number of subscribers to cable systems in which each MSO has any interest, reporting separately for systems in which the MSO has both a controlling and non-controlling interest;

(b) the number and identity of cable programming services (exclusive of local origination channels) in which MSOs have an ownership interest;

(c) the names and board affiliations of all of the MSOs' board members who also serve on the boards of other cable, broadcast, program production, or other communications companies (including telecommunications companies);

(d) the identity of all minority-owned and minority-controlled MSOs and cable programming services; and

(e) the identity of the MSOs that hold interests in cable programming services, a description of the amount and type of such interests, and the date on which the interest was acquired, identifying, in particular, any changes that have occurred since passage of the 1992 Cable Act.

61. We propose to gather information on the existence and extent of affiliations, including but not limited to investments, joint ventures, and partnerships, between multichannel video programming distributors and other communications companies. Examples of such affiliations include the investment by U.S. West in Time Warner Entertainment, Comcast's ownership interest in cellular telephone operations, TCI and Microsoft's interactive television test, and the partnership interests of several MSOs in Primestar's[77] direct-to-home satellite service.

62. Commenters are asked to address the relevance and impact of such investments and affiliations on the status of competition in the market for multichannel video programming. To the extent that commenters believe such information is relevant, how should the Commission collect such data in the least burdensome manner? We request comment on whether the Commission can reasonably expect voluntary disclosure of such affiliations.

63. Moreover, now that the Commission has adopted various structural and conduct regulations in compliance with the 1992 Cable Act, we propose examining the impact upon programming services, if any, that has occurred as a result of the interplay between those limitations. Thus, we seek comment on the following questions:

(a) Has leased access provided a carriage outlet for programming services unable to secure carriage on an MSO's system?

(b) Have cable systems' must carry obligations affected unaffiliated programmers' access to carriage?

(c) Have the financial interest and exclusivity rules had any impact upon unaffiliated programming vendors' ability to secure carriage by MSOs?

(d) Has the ability of programming vendors, both affiliated and unaffiliated, to secure carriage, been affected by channel occupancy restrictions?

(e) What aspects of the interplay between subscriber and channel occupancy limits should we examine for purposes of ascertaining impacts upon the development of new programming services?

(f) Are there aspects of the horizontal or vertical ownership limitations, whether working together or independently, that have affected the development of new programming services?

(g) What changes, if any, have occurred in programming vendors' ability to reach desired numbers of subscribers since the adoption of the ownership limitations?

(h) To what extent has MSO investment in programming services been affected by the ownership limitations?

(i) Have subscriber penetration levels of unaffiliated programming services changed?

---

[74] Appendix G of the 1990 Report is attached hereto as "Appendix A."

[75] *See* 8 FCC Rcd at 8583, n.64.

[76] *See* 8 FCC Rcd at 8583.

[77] *See* n.90, *infra*.

64. Finally, we propose to seek comment and information on how recent or proposed mergers or partnerships and alliances involving programming vendors, cable operators, or telephone companies will affect the cost, quality and variety of video programming. Specifically,

(a) How will such mergers, partnerships and alliances affect competition between the cable industry and other competing distribution technologies?

(b) How will the entry of competing distribution technologies affect the vertical relationships between cable systems and program suppliers?

(c) In particular, how might such entry affect relationships between cable systems and program suppliers?

(d) What regulatory and antitrust concerns, if any, are raised by such combinations?

V. Changes in Practices/Conduct of Multichannel Video Programming Vendors and Distributors Since Passage of the 1992 Cable Act

65. Because the ability of multichannel video programming distributors to compete effectively depends on their ability to offer video programming that appeals to the marketplace, all distributors need access to desirable, reasonably priced programs. Certain conduct by cable operators and vertically integrated programming vendors can have anticompetitive effects on both programming and distribution markets, since access to programming on fair, reasonable and non-discriminatory terms is essential to the entry and survival of competing distribution technologies. Moreover, programming vendors themselves may be injured when: (a) as a condition of carriage on a particular system, a programming vendor is forced to provide equity participation or exclusivity to a distributor exercising undue market power, or (b) distributors exercising undue market power attempt to interfere with the programming vendor's decision to sell programming to competing distributors.

66. In response to concerns about the effects on the distribution of programming of increased vertical integration and horizontal ownership,[78] Congress sought to include provisions in the 1992 Cable Act that would address the development of competition in the video programming marketplace. Specifically, Congress adopted Sections 12 and 19, which add new Sections 616 and 628 to the Communications Act.

67. Section 628 requires the Commission to prescribe regulations governing access to cable programming services by competing multichannel systems.[79] Section 628(b) prohibits cable operators, vertically integrated satellite cable programming vendors and all satellite broadcast programming vendors from engaging in "unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing satellite [cable or broadcast] programming to subscribers or consumers."[80]

68. Section 628(c) directs the Commission to prescribe regulations that, at a minimum, prohibit (a) a vertically integrated cable operator from unduly or improperly influencing the prices, terms, or conditions of the sale of programming by its affiliated programmer to unaffiliated distributors; (b) discrimination in the prices, terms, and conditions of the sale of satellite cable or broadcast programming to competing distributors; and (c) exclusive contracts except in specified circumstances.[81]

69. Section 616 of the Communications Act governs carriage agreements between cable systems (or other multichannel video programming distributors) and video programming vendors. These provisions are intended to prevent distributors from taking undue advantage of unaffiliated programming vendors.

70. On April 1, 1993, the Commission promulgated program access rules to implement Section 19 of the 1992 Cable Act, which allow multichannel video programming distributors to seek redress at the Commission when they are subject to undue interference, discriminatory prices, terms or conditions, or prohibited exclusionary practices.[82]

71. Furthermore, on September 23, 1993, the Commission adopted regulations to implement Section 12 of the 1992 Cable Act.[83] Pursuant to these regulations, cable operators cannot take undue advantage of programming vendors by coercing them to grant ownership interests or exclusive distribution rights as a condition of carriage on their systems, and also may not retaliate against them for failing to provide exclusive carriage rights. Finally, cable operators cannot engage in conduct that unreasonably restrains the ability of programming vendors unaffiliated with the operator from competing fairly with other programming vendors.[84]

72. Through this *NOI* we seek to determine whether anticompetitive practices in the multichannel video programming and distribution markets have diminished, and whether new and potentially anticompetitive conduct has developed. Following an analysis of the comments we receive, we will report our findings to Congress, and propose appropriate regulatory or legislative action where necessary to ensure that the public interest is served by preserving consumer access to a wide array of multichannel video programming from competing distributors.

73. As an initial matter, we intend to examine whether the anticompetitive conduct, as identified in the 1990 Report and in the legislative history to the 1992 Cable Act, has abated. Thus, we request comment on the extent to which the conduct within the scope of our rules continues.

---

[78] *See, e.g.*, 1990 Report at 5006, 5008, and 5021.e

[79] *See* Communications Act, § 628; 1992 Cable Act, § 19; 47 U.S.C. § 548.

[80] *See* Communications Act, § 628(b); 1992 Cable Act, § 19; 47 U.S.C. § 548(b).

[81] *See* Communications Act, § 628(c); 1992 Cable Act, § 19; 47 U.S.C. § 548(c).

[82] *First R & O*, 8 FCC Rcd at 3416-3423; 47 C.F.R. §§ 76.1000 *et seq.*

[83] *Second Report and Order* in *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992, Development of Competition and Diversity in Video Programming Distribution and Carriage*, ("*Second R&O*"), MM Docket No. 92-265, 8 FCC Rcd 3359; (1993), *recon. pending*.

[84] *See* 47 C.F.R. § 76.1301.

Commenters are asked to support their positions with specific information or examples.[85] In addition, we seek comment on the current ability of distributors employing alternative technologies to compete with cable systems for the purchase of, or for access to, programming services. What changes have occurred with respect to the sources and supply of video programming (1) at the national level; (2) in rural areas; and (3) to cabled areas? Commenters are asked to provide specific facts or examples to support their comments and views. For example, we invite commenters to respond to the following questions:

(a) How has the conduct of cable operators, competing multichannel video programming distributors, and vertically ntegrated programming vendors changed? Have such changes brought demonstrable benefits to consumers?

(b) Can it be argued, or demonstrated, that the mere existence of the statutory provisions and our rules has already affected programming practices and conduct?

(c) To what extent is previously unavailable programming now available to competing distribution technologies?

(d) How, if at all, have carriage negotiations changed?

74. We also seek to determine whether anticompetitive practices that affect the distribution and availability of multichannel video programming, other than those already addressed by the rules, have developed. Accordingly, we ask that commenters describe (supported with specific examples and/or empirical evidence, when possible) specific sales or negotiating practices, other than those already addressed by the program access rules, that have occurred, or may occur, which may have an anticompetitive impact on competing multichannel video programming distributors. Specifically, we ask c mmenters to address the following:

(a) Do vertically integrated MSOs currently discriminate against rival programming services in terms of prices charged to subscribers for services? In terms of channel position?

(b) Do vertically integrated MSOs currently treat rival programming services differently from affiliated services in terms of advertising support or promotion?

(c) Do vertically integrated MSOs currently discriminate against non-affiliated programming vendors with respect to tiering or packaging of services? With respect to signal quality?

(d) How does the vertical relationship affect other aspects of access or carriage negotiations?

(e) Do the practices and incentives involved in the decisions relating to carriage of programming services differ depending on whether the services in question are, at least in part, advertiser supported?

75. To the extent this inquiry may demonstrate or suggest that participants in the cable programming industry continue to engage in the anticompetitive practices identified in the statute and our rules, we invite analyses of the causes and effects of those practices. What are the relevant product and geographic markets affected by these practices? In addition, we seek comments on the relative market shares of cable operators and other distributors that serve those markets. Specifically,

(a) Who are the actual or potential non-cable competitors for programming in each market?

(b) What portion of each market is served by other multichannel video programming distributors? How vigorous is the competition for programming among these multichannel video programming distributors?

76. In addition to the conduct/behavior discussed above, we believe that analysis of certain other issues is relevant to an examination of the status of competition in the market for the delivery of video programming. For example, we ask commenters to identify the current factors used by distributors in making programming carriage decisions. In particular, how does subscriber demand affect cable operator carriage decisions and the carriage decisions of competing technologies? Do distributors currently measure or assess subscriber demand for particular programming services, and if so, how?

77. Finally, to the extent that commenters express continued concerns about the existence of undue market power by cable operators, other multichannel video programming distributors, or vertically integrated programming vendors engaging in conduct that is not expressly encompassed within our rules, we invite commenters to suggest regulatory responses that will address them.

VI. Collection of Data for Future Reports

78. As stated earlier, we intend to rely on the data that is submitted in response to this *NOI* for purposes of preparing our first report to Congress. For the future, however, we believe that it may be desirable to establish more systematic reporting procedures. Thus, we invite commenters to suggest specific studies, surveys, samplings, methodologies, etc. that the Commission might undertake to gather the information that will enable us to prepare accurate and comprehensive reports. Moreover, we ask commenters to suggest any specific databases that the Commission might develop and maintain to facilitate the preparation of our annual reports.

79. With respect to information related to horizontal ownership and vertical integration, comment is sought on the appropriate methods that the Commission should employ to gather the data necessary to update the charts and tables contained in Appendix G to the 1990 Report. For example, commenters are asked:

[85] It may be necessary to omit specific identities to protect the confidential nature of business relationships, although we encourage the fullest possible reporting.

(a) Should the Commission send surveys or questionnaires to particular MSOs and vertically integrated programming vendors? If so, how should the survey audience be selected?

(b) Should surveys be sent to all cable systems, or to the top 100 systems/MSOs as reported by the trade press?

(c) How often should the charts and tables contained in Appendix G to the 1990 Report be updated?

80. With respect to the information required for our evaluation of the development of competitive technologies for the delivery of multichannel video programming, we seek comment on the appropriate means of gathering such data. For example, should the Commission adopt annual reporting requirements for various multichannel video programming distributors and vertically integrated programming vendors? If so, what should those reporting requirements entail?[86] If commenters oppose our imposing such reporting obligations on *all* multichannel distributors and vertically integrated entities, we ask that they identify appropriate limits on both the amount and type of information collected as well as on whom the reporting obligations are imposed.

81. We believe that our licensing authority over the various multichannel distributors, as well as Section 19(f)(2) and Section 3(g) of the 1992 Cable Act, provides a sufficient legal basis to establish and impose any such reporting requirements with respect to both multichannel distributors and vertically integrated programming vendors.[87] We invite commenters to address this conclusion. We seek comment on ways to reduce the burdens that may be imposed on the regulated parties by such reporting requirements. In this regard, we ask commenters to address specifically what types of burdens would imposition of each proposed reporting requirement place on the affected industries and on the Commission? What are the advantages that may be gained by both regulators and consumers in gathering such information? Would the advantages outweigh the burdens?

82. How much of this information is already provided to the Commission through existing reports or applications, such as applications for assignment or transfers of control of Cable Antenna Relay Service ("CARS") licenses? Alternatively, what information is available through public sources, and what are those sources? How often are they updated?

83. Further, we ask commenters to consider the extent to which any of the information sought for our report might be similar to information already collected by the relevant parties for other purposes related to our implementation and enforcement of the 1992 Cable Act. For example, we note that in connection with the adoption of channel occupancy limits pursuant to Section 11 of the 1992 Cable Act, Section 76.504(e) of the Commission's Rules requires cable operators to maintain various records for at least three years in their public files.[88] Such records must be available to local franchising authorities, the Commission, or members of the public on reasonable notice and during regular business hours.[89]

84. Our rules do not further elaborate on the precise type, manner, form or time frame for how the required information should be maintained. We seek comment from cable operators subject to this record maintenance requirement (and from franchising authorities who are primarily responsible for monitoring cable operator compliance with the channel occupancy rules) on the records anticipated to be compiled and maintained, and whether any additional burden would exist if we require the filing of such records with the Commission. Should such records be maintained at the Commission and how often should they be updated?

85. Similarly, a number of vertically integrated MSOs already have agreed to significant annual reporting requirements with respect to program distribution in connection with their participation in the Primestar medium-power DBS service.[90] Primestar entered into a consent decree with the Department of Justice to settle antitrust litigation involving cable programming access by distributors that compete with the partner MSOs. In addition, Primestar and its partners, excluding Viacom, entered into a consent decree with the Attorneys General of forty states to settle concurrent antitrust litigation ("Primestar Decree"). Viacom entered into a separate consent decree with the forty Attorneys General ("Viacom Decree").[91]

86. Pursuant to the Primestar and Viacom decrees, substantial annual reporting requirements are imposed on the settling defendants. For example, each of the Primestar Partners and Viacom are required annually to provide to the forty states a verified written report of their compliance with the terms of the respective decrees. The report must include for each reporting entity, where applicable, the following:

a. a list of all programming services in which the entity has an interest and the extent of any such interest as of the date of the report;

b. a list of all national programming services with which the entity has entered into company-wide distribution agreements during the year in which the report is filed;

---

[86] The Commission has previously indicated its intention to initiate a rulemaking proceeding proposing that competitors to cable television be required to file with the Commission annual registration statements providing data with respect to reach and penetration. *See Rate Order*, 8 FCC Rcd 5670 n.145 (1993). Similarly, relevant information from programming vendors could include aggregate totals of programming sold to the various types of multichannel video programming distributors, and the numbers of subscribers (where available) receiving the programming from each type of distributor.

[87] *See e.g.*, 47 U.S.C. § 548(f)(2), and 47 U.S.C. § 543(g). We note that the Commission has not yet specified the appropriate reporting requirements that will be required of cable operators to comply with Section 3(g). *See Notice of Proposed Rulemaking* in *Implementation of Sections of the Cable Television, Consumer Protection and Competition Act of 1992; Rate Regulation*, MM Docket No. 93-215, 58 F.R. 40762 (July 30, 1993).

[88] *See* 47 C.F.R. § 76.504(e).

[89] *Id.*

[90] *See* III(B)(1), *supra*. The seven cable MSO partners who originally invested in Primestar were Comcast Corporation, Continental Cablevision, Inc., Cox Enterprises, Inc., Newhouse Broadcasting Corporation, Tele-Communications, Inc., Time Warner, Inc., and Viacom, Inc. (the "Primestar Partners").

[91] *State of New York ex rel Abrams v. Primestar Partners, L.P.*, 1993-2 Trade Cases ¶ ¶ 70,403, 70,404 (S.D.N.Y. 1993).

c. a list of all programming services for which the entity has exclusive distribution rights, in whole or in part, as of the date of the report; and

d. a list of all programming and cable assets subject to the decrees sold or otherwise transferred during the year with respect to which the report is filed, setting forth the identity of the purchaser or transferor and the percent of the cable system and/or programming assets of the ultimate parent of the entity that were sold or otherwise transferred.[92]

87. The decrees further provide, however, that any information provided to the states under the terms of the decrees shall be kept confidential, and may only be used in judicial proceedings to enforce the decrees by the states upon five days' notice to the relevant party, who may seek a protective order from the court to prevent the information from being used in open court.[93] Thus, it does not appear that the Commission will have access to any of the information that the Primestar Partners and Viacom have agreed to provide annually to the forty states. Nevertheless, it may be useful for the Commission itself to gather this or similar information, not only from these entities, but from all vertically integrated entities governed by the program access and carriage agreement provisions. Commenters are requested to respond to this suggestion.

88. Reliance on information gleaned through the Commission's formal program access complaint process alone may not yield a complete picture of potential and actual anticompetitive actions or behavior relating to program access. Therefore, for purposes of supplementing our annual reporting to Congress, and determining the adequacy of our enforcement procedures, we invite commenters to suggest mechanisms for our receipt of such evidence of marketplace behavior. Specifically:

(a) Could some type of anonymous reporting procedure be developed, or would it be too susceptible to abuse?

(b) What information should the Commission request, and how should the Commission follow up on anonymous allegations, to facilitate development of an informed opinion regarding the allegedly anticompetitive practice(s)?

89. Finally, the Commission is sensitive to the fact that some information that could be requested may include proprietary or otherwise confidential information or data.[94] We request that commenters specifically address such concerns and provide suggestions as to how the Commission should gather, examine, protect or release such information/data. Where confidential information must be collected, we seek comment on methods for protecting individual confidentiality.

VII. PROCEDURAL MATTERS

90. This *NOI* is issued pursuant to authority contained in Sections 4(i), 4(j), 403, and 628(g) of the Communications Act of 1934, as amended. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, interested parties may file comments on or before June 29, 1994, and reply comments on or before July 29, 1994. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments, and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original plus ten copies must be filed. Comments and reply comments should be sent to the Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

91. For purposes of this proceeding, because of its relationship to other pending and proposed rule making proceedings, the non-restricted notice and comment *ex parte* rules will be applied. Under these rules, *ex parte* presentations are permitted except during the Sunshine Agenda period. *See generally*, 47 C.F.R. Section 1.1206(a). The Sunshine Agenda Period is the period of time which commences with the release of a public notice that a matter has been placed on the Sunshine Agenda and terminates when the Commission: (1) releases the text of a decision or order in the matter; (2) issues a public notice stating that the matter has been deleted from the Sunshine Agenda; or (3) issues a public notice stating that the matter has been returned to the staff for further consideration, whichever occurs first. 47 C.F.R. Section 1.1202(f). During the Sunshine Agenda period, no presentations, *ex parte* or otherwise, are permitted unless specifically requested by the Commission or staff for clarification or adduction of evidence or the resolution of issues in the proceeding. 47 C.F.R. Section 1.1203. In general, an *ex parte* presentation is any presentation directed to the merits or outcome of the proceeding made to decision-making personnel which (1) if written, is not served on the parties to the proceeding, or (2) if oral, is made without advance notice to the parties to the proceeding and without opportunity for them to be present. 47 C.F.R. Section 1.1202(b). Any person who submits a written *ex parte* presentation must provide on the same day it is submitted, a copy of same to the Commission's Secretary for inclusion in the public record. Any person who makes an oral *ex parte* presentation that presents data or arguments not already reflected in the person's previously filed written comments, memoranda, or filings in the proceeding must provide on the day or oral presentation, a memorandum to the Secretary (with a copy to the Commissioner or staff member involved) which summarizes the data and arguments. Each *ex parte* presentation described above must state on its face that the

[92] *See* Section VIII-B of both the Primestar Consent Decree and the Viacom Consent Decree, 1993-2 Trade Cases ¶ ¶ 70,403, 70,404.

[93] *See* Section XI of both Viacom and Primestar Decrees, 1993-2 Trade Cases ¶ ¶ 70,403, 70,404.

[94] *See* 47 C.F.R. § 0.459.

Secretary has been served, and must also state by docket number the proceeding to which it relates. 47 C.F.R. Section 1.1206.

92. Further information on this proceeding may be obtained by contacting Nina M. Sandman or Diane Hofbauer at (202) 416-0856 in the Competition Division of the Cable Services Bureau.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

APPENDIX G

HORIZONTAL CONCENTRATION, VERTICAL INTEGRATION AND PROGRAM ACCESS

TABLE I

CURRENT CONCENTRATION OF CONTROL OF THE CABLE TELEVISION INDUSTRY 1/

Rank	Company	Share of Top 50 2/	Share of Total Industry 3/
1	TCI	24.73%	22.16%
2	Time Warner	12.92	11.58
3	Comcast Cable	9.25	8.29
4	Continental Cablevision	5.39	4.83
Top 4		52.29	46.86
5	Cox Cable	3.38	3.03
6	Cablevision Systems	3.17	2.84
7	Jones Intercable*	3.06	2.74
8	NewChannels	2.53	2.27
Top 8		64.43	57.74
9	Times Mirror*	2.35%	2.10%
10	Cablevision Industries*	2.17	1.95
Top 10*		68.95	61.79
Top 25*		88.80	79.58
Top 50*		100.00	89.60

HHI assuming the top 50 companies represent the whole industry = 975**

Gini Index for top 50 companies = 0.64**

1/ As part of this Inquiry, the Commission requested certain updated information, including subscriber counts, from the top nine MSO's. This table was generated using that information, other comments filed in the Inquiry, and the top 50 MSO list from Broadcasting, December 11, 1989, page 42. The analysis has been adjusted to reflect the ATC/Time Warner merger.

2/ Total number of subscribers for the top 50 MSOs is 47,705,561. Information on the top 50 MSOs is used to determine the HHI.

3/ According to Broadcasting, March 26, 1990, at 16, the total number of cable subscribers is 53,238,000. Data prepared by Broadcasting and industry sources.

* Updated subscriber counts for these MSOs were unavailable and therefore estimated. To obtain the 1990 subscriber counts, the 1989 subscriber counts for these MSOs were adjusted upward by a factor of 1.046, which represented the overall growth factor in cable subscribership (53,238,000 divided by 50,897,080 = 1.046). The 1989 subscriber count was obtained from Broadcasting, December 11, 1989, at 42. This adjustment compensates for the continuing growth of the cable industry as a whole and prevents us from overrepresenting the top MSOs' share of the industry.

** If data were available for the entire industry, the indices would be lower. A lower value indicates less concentration. Therefore, the analysis based on only 50 companies maximizes the estimate of industry concentration.

TABLE II

CHANGES IN CONCENTRATION OF CONTROL OF THE CABLE INDUSTRY WITHIN THE TOP 50 COMPANIES 1/

	1972	1975	1979	1982	1984	1985	1988	1989	1990
Top Co. Share	15.0	15.3	11.6	11.1	10.7	12.4	24.8	25.8	24.7
Top 4 Share	35.9	37.3	34.3	37.3	33.6	34.3	45.5	50.4	52.3
Top 8 Share	53.4	54.0	52.1	54.6	51.8	50.6	58.4	63.0	64.4
Top 10 Share	59.6	59.3	58.0	60.3	58.0	56.8	63.7	67.7	69.0
Top 25 Share	83.2	82.7	83.0	83.8	82.4	82.9	85.5	88.4	88.8
HHI	524	533	468	507	457	464	868	1000	975
Gini Index	.52	.52	.49	.53	.50	.51	.59	.63	.64

TABLE III

CHANGES IN CONCENTRATION OF CONTROL OF THE CABLE INDUSTRY BASED ON TOTAL SUBSCRIBERS 1/

	1972	1975	1979	1982	1984	1985	1988	1989	1990
Top Co. Share	9.9	10.4	8.4	8.7	9.2	9.0	20.9	22.2	22.2
Top 4 Share	23.9	25.2	24.9	29.3	28.7	24.9	38.4	43.4	46.9
Top 8 Share	35.4	36.5	37.8	42.8	44.2	36.8	49.3	54.2	57.7
Top 10 Share	39.6	40.1	42.1	47.4	49.5	41.3	53.8	58.3	61.8
Top 25 Share	55.2	56.0	60.3	65.8	70.2	60.7	73.1	76.1	79.6
Top 50 Share	66.4	67.8	72.7	78.5	85.2	72.3	84.5	86.2	89.6

1/ Data for 1990 from Table I above. Data for 1989 calculated from information appearing in Broadcasting, December 11, 1989, at 42. Data for 1988 and 1985 calculated from information appearing in Broadcasting, May 2, 1988, at 36, and December 2, 1985, at 37, respectively. Data for 1984 calculated from information in Television & Cable Factbook Volume 52 at 1726 and Volume 53 at 1385 and Television Digest 1985, Cable and Station Coverage Atlas, at 4. Other data taken from 1982 Report and Order in Docket No. 18891, 91 FCC 2d 46 (1982), Appendix A.

Table IV

NATIONAL CABLE PROGRAMMING NETWORKS WITH CABLE OPERATOR OWNERSHIP/EQUITY 1/

Service	Began
AMC (American Movie Classics)	10/84
BET (Black Entertainment Television)	1/80
Bravo	2/80
CBN Family Channel	5/77
CNBC (Consumer News and Business Channel)	4/89
CNN (Cable News Network)	6/80
C-SPAN I	3/79
C-SPAN II	6/86
Cable Value Network	5/86
Cinemax	8/80
The Discovery Channel	6/85
The Fashion Channel (TFC)	10/87
HBO	12/75
Headline News	1/82
Lifetime	2/84
Mind Extension University	11/87
MTV	8/81
The Movie Channel	12/79
Movietime	7/87
Nickelodeon	4/79
NICK at Nite	7/85
The Nostalgia Channel	2/85
QVC Network	11/86
Request Television	11/85
Request Television 2	7/88
Shop Television Network	10/87
Showtime	7/76
SportsChannel America	1/89
SuperStation TBS	12/76
TNT (Turner Network Television)	10/88
The Travel Channel	2/87
VH-1	1/85
Viewers Choice 1	11/85
Viewers Choice 2	6/86
VISN (Vision Interfaith Satellite Network)	9/88

1/ This table was derived from Benjamin Klein, "The Competitive Consequences of Vertical Integration in the Cable Industry," (Klein study) June 1989, which was submitted as part of NCTA's comments. The Klein study was compiled based on information obtained in 1988 and 1989. Klein's table was edited to reflect certain ownership changes since that time.

Table V

NATIONAL CABLE PROGRAMMING SERVICES WITH NO CABLE OPERATOR OWNERSHIP INTEREST 1/

Service	Began
A&E Cable Network (Arts & Entertainment)	2/84
ASTS Satellite Network Television	5/84
Alternate View Network	10/85
American's Value Network	3/87
Cable Video Store	1/85
Country Music Television	3/83
The Disney Channel	4/83
ESPN (Entertainment & Sports Prog. Network)	9/79
EWTN (Eternal Word Television Network)	8/81
Family Guide Network	6/86
Family Net (formerly Liberty Broadcasting)	6/80
Financial News Network (FNN)	11/81
FNN/SCORE	4/85
FNN/TelShop	8/86
Galavision/ECO	10/79
Hit Video USA	12/85
Home Shopping Network I	7/85
The Inspirational Network	4/78
International Television Network	1/88
KTLA	3/88
KTVT	7/84
The Learning Channel (TLC)	10/80
TNN (The Nashville Network)	3/83
National Jewish Television	5/81
The Playboy Channel	11/82
The Silent Network	2/84
TBN (Trinity Broadcasting Network)	4/78
Univision (formerly SIN Television Network)	9/76
USA Network	9/80
The Weather Channel	5/82
WGN	11/78
WPIX	5/84
WSBK	2/88
WWOR	4/79
Zap Movies (formerly Telstar)	11/86

1/ This table was derived from the Klein study. The Klein study was compiled based on information obtained in 1988 and 1989. Klein's table was edited to reflect certain ownership changes since that time.

Table VI

Major MSO Cable Network Ownership 1/
(as of 12/31/89) 2/
(figures are percentages of attributable ownership
rounded to tenths of a percent)

Cable Program Service	TCI	Viacom	<Time Warner> ATC	<Time Warner> Warner	Conti-nental	Cox	Com-cast	Cable-Vision	New Chan.*
Am. Movie Clcs.	50.0	-	-	-	-	-	-	50.0	-
BET TV, Inc.	14.3	-	<14.3a/>		-	-	-	-	-
Discovery Ch.	49.2b/	-	-	-	-	24.6	-	-	24.8
Fashion Ch.	36.6b/	-	-	-	-	-	-	-	-
Int'l Ca. Tech.	11.7	-	-	-	-	-	-	-	-
Movietime Ch.	10.5	-	11.0	44.0	11.0	11.4	-	-	11.3
Netlink USA	80.0	-	-	-	-	-	-	-	-
PA Educ. Comm.	11.7	-	-	-	-	-	-	-	-
Prevue Guide	20.0	-	-	-	-	-	-	-	-
Prime Time Inc.	35.0	-	-	-	-	12.5	-	-	12.5
QVC Network	22.7b/	-	9.3	25.7	e/	-	13.0c/	-	-
So. Sat. Sys.	100.0	-	-	-	-	-	-	-	-
Think Ent.	37.5	-	-	-	-	-	-	-	-
Turner B/C Sys.	14.5b/	e/	-	18.1	e/	-	-	-	-
XPress Info.	100.0	-	-	-	-	-	-	-	-
KBL Ent.	100.0	-	-	-	-	-	-	-	-
TCI N.W. CATV	100.0	-	-	-	-	-	-	-	-
Affil. Reg. Com.	60.0	-	-	-	-	-	-	-	-
Raycom Partners	50.0	-	-	-	-	-	-	-	-
Sunshine Net.	56.1	-	9.6	-	18.0	-	6.6c/	-	-
Showtime	d/	100.0	-	-	-	-	-	-	-
The Movie Ch.	-	100.0	-	-	-	-	-	-	-
MTV	-	100.0	-	-	-	-	-	-	-
Nickelodeon	-	100.0	-	-	-	-	-	-	-
VH-1	-	100.0	-	-	-	-	-	-	-
Lifetime	-	33.0	-	-	-	-	-	-	-
HA! Comedy Net.	-	100.0	-	-	-	-	-	-	-
Pacific Spts.	50.0	50.0	-	-	-	-	-	-	-
Prime Spts. NW	60.0	40.0	-	-	-	-	-	-	-
Pay-P/View Net.	-	11.0	16.7	-	12.0	12.5	11.1c/	-	11.1
Info Channel	-	-	-	-	-	-	-	-	5.7
HBO	-	-	<100.0a/>		-	-	-	-	-
Cinemax	-	-	<100.0a/>		-	-	-	-	-
Video Jukebox	-	-	-	-	-	-	-	-	16.7
Z - Ch.	-	-	-	-	33.0	-	-	-	-

1/ These data are culled from responses to letters sent to these individual companies requesting data with respect to their vertical interests. The letters were sent by the Chief, Mass Media Bureau on December 29, 1989.

Cable Program Service	TCI	Viacom	<Time Warner> ATC	<Time Warner> Warner	Conti-nental	Cox	Com-cast	Cable-Vision	New Chan.*
Amer. Shop Ch.	-	-	-	-	-	30.0	-	-	-
Spotlight	-	-	-	-	-	20.0	-	-	-
Bravo	-	-	-	-	-	-	-	50.0	-
CNBC	-	-	-	-	-	-	-	50.0	-
News 12 Long I.	-	-	-	-	-	-	-	49.5	-
PRISM	-	-	-	-	-	-	-	50.0	-
SprtsCh. Amer.	-	-	-	-	-	-	-	50.0	-
SprtsCh. Chi.	-	-	-	-	-	-	-	50.0	-
SprtsCh. Fla.	-	-	-	-	-	-	-	50.0	-
SprtsCh. L.A.	-	-	-	-	-	-	-	50.0	-
SprtsCh. N.E.	-	-	-	-	-	-	-	50.0	-
SprtsCh. N.Y.	-	-	-	-	-	-	-	50.0	-
SprtsCh. Ohio	-	-	--	-	-	-	-	50.0	-

* Includes NewChannels affiliated companies Metrovision, Inc. and Vision Cable Communications, Inc.

a/ Time Warner controls the indicated percent of this cable program service. Time Warner owns 82% of ATC and 100% of Warner Cable.

b/ This is the ownership figure for this cable program service as indicated in the acquisition section of TCI's letter. TCI holds a higher percentage than indicated of warrants or class B and C stocks for this cable service.

c/ Comcast supplied these percentage figures in a follow-up letter dated 2/15/90. Comcast has a beneficial ownership in the QVC Network of 28.1%.

d/ TCI has a 50% purchase of Showtime pending.

e/ This company has less than 5% interest in these cable networks.

2/ TCI has recently purchased a financial interest in the Family Channel. TCI has also announced its intention to spin off its programming interests. See letter dated January 31, 1990, to Roy J. Stewart, Chief, Mass Media Bureau from John M. Draper, Vice President and General Counsel of TCI.

Table VII

VERTICAL CONNECTION BETWEEN MAJOR CABLE PROGRAMMING NETWORKS AND CABLE SYSTEM OPERATORS 1/

Programming Network (top 25)	Subscribers (millions)	MSOs with Ownership/Equity Interest in Network	Date Began
ESPN	55.9	None	9/79
CNN	54.4	TCI(21.8%), Time-Warner(18.1%), Viacom(<5%), et al.	6/80
SuperStation TBS	54.0	TCI(21.8%), Time-Warner(18.1%), Viacom(<5%), et al.	12/76
USA Network	51.5	None	4/80
Nickelodeon/NICK at Nite	50.8	Viacom (100%)	4/79,7/85
MTV	50.4	Viacom (100%)	8/81
The Nashville Network	50.0	None	3/83
C-SPAN	49.7	2/	3/79
The Discovery Channel	49.7	TCI(49.2%), Newhouse(24.8), Cox (24.6)	6/85
The Family Channel	49.1	TCI(17%)	4/77
Lifetime	47.0	Viacom(33%), Hearst(33%)	2/84
TNT	44.5	TCI(21.8%), Time-Warner(18.1%), Viacom(<5%), et al.	10/88
A&E Cable Network	44.0	None	2/84
The Weather Channel	43.0	None	5/82
Headline News	41.8	TCI(21.8%), Time-Warner(18.1%), Viacom(<5%), et al.	1/82
Video Hits-One	34.6	Viacom (100%)	1/85
QVC Network	33.9	TCI(22.7%), Time-Warner(25.7%), Comcast (est.16%)	11/86
Financial News Network	33.8	None	11/81
WGN	30.0	None	11/78
BET	27.0	TCI(14.3%), Time-Warner (through HBO 14.3%)	1/80
American Movie Classics	26.0	TCI(50.0%), Cablevision(50.0%)	10/84
FNN/Sports	22.3	None	4/85
C-Span II	20.7	2/	6/86
The Learning Channel	20.0	None	10/80
Home Shopping Network I	19.9	None	7/85

1/ This table was derived from Cable Television Developments, NCTA Research & Policy Analysis Department, May 1990; data compiled from responses to FCC questions to cable operators and services; Tables IV, V, and VI.

2/ Cable affiliates provide 95 percent of the funding for C-SPAN, but have no owership or program control interests.

Table VIII

VERTICAL INTEGRATION: TOP FIFTEEN MAJOR CABLE PROGRAMMING NETWORKS (BY RATING) 1/

Rank	Service	Date Began	MSOs with Ownership/Equity
1	TBS	12/76	TCI(21.8%), Time-Warner(18.1%) Viacom(<5%), et al.
2	USA	9/80	none
3	ESPN	9/79	none
4	CNN	6/80	TCI(21.8%), Time-Warner(18.1%) Viacom(<5%), et al.
5	TNT	10/88	TCI(21.8%), Time-Warner(18.1%) Viacom(<5%), et al.
6	TNN	3/83	none
7	Discovery Channel	6/85	TCI(49.2%), Cox(24.6%), Newhouse(24.8%)
8	NICK at Nite	7/85	Viacom (100%)
9	Lifetime	2/84	Viacom(33%), Hearst(33%)
10	Family Channel	5/77	TCI (17%)
11	A&E	2/84	none
12	MTV	8/81	Viacom (100%)
13	Headline News	1/82	TCI(21.8%), Time-Warner(18.1%) Viacom(<5%), et al.
14	BET	1/80	TCI(14.3%), Time-Warner(14.3% through HBO)
15	Weather Channel	5/82	none

1/ This Table was derived from Nielsen's First Quarter CNAD Report, as presented in Broadcasting, June 18, 1990, at 52; data compiled from responses to FCC questions to cable operators and services; Tables IV, V, and VI.

Table IX

Access to Program Networks by Competitive Media
(Y = able to obtain; N = unable to obtain)

	(HSD)	(<----------MMDS 1/----------->)						SMATV
	NRTC a/	CableMax	Peo.Ch.	Cleve.Wire.	Tele/PR	WCTV	MAGNAVISION	NPCA
HBO	Y	N f/	N	-	-	-	N	-
Cine	Y	N f/	N	-	-	-	-	-
Show	N b/	N f/	N	-	-	-	N k/	-
TMC	N b/	N f/	N	-	-	-	-	-
AMC	Y c/	-	N g/	No resp	-	-	-	N t/
MTV	N d/	-	-	-	-	-	No resp	u/
VH1	N d/	-	-	-	-	-	-	-
Dis *	Y	-	N	-	-	-	l/	-
FNN *	N d/	-	-	-	-	-	-	-
NICK	Y	-	-	-	-	-	No resp	-
TNT	N d/	N f/	N	-	-	-	N m/	-
TNN *	Y	-	-	-	-	-	-	-
CNBC	No resp	-	-	-	-	-	-	-
CNN	Y	-	-	-	-	-	-	-
A&E *	-	-	-	No resp	-	-	N n/	-
ESPN *	e/	-	Y h/	-	-	N j/	N o/	-
SPTS CH	-	-	N	-	-	-	p/	-
HSPTS	-	-	N	-	-	-	-	-
USA *	-	-	-	-	N i/	-	N q/	v/
MovT	-	-	-	-	-	-	N r/	-
Life	-	-	-	-	-	-	s/	-

* Program network is not vertically integrated with an MSO.

a/ NRTC states that it must pay, on average, 460% more for programming than small cable companies (i.e. $10 vs. $2.25 for an 18 channel package).

b/ NRTC states that it has made an offer to Viacom for the service. NRTC has yet to receive a response.

c/ A written proposal from AMC is currently under review.

d/ NRTC has been unable to obtain this service after reasonable and repeated requests. NRTC does not define reasonable or repeated.

e/ NRTC states that ESPN offered a contract to provide service in "restricted" territories. ESPN, in its comments, defends exclusivity as a valuable and time-tested component of the television business. ESPN states that it does not generally grant exclusive distribution rights.

f/ CableMaxx has yet to secure access to this service despite its offers to post letters of credit equal to several months billing.

g/ Cablevision Systems Corp., in reply comments, states that it supplies its programming to several wireless cable operators including Peo. Ch.

h/ People's Choice is not authorized to distribute ESPN through wireless cable. People's Choice is limited to distributing ESPN only via its SMATV facilities. See footnote e.

i/ Telecable of Puerto Rico had provided its subscribers with USA Network for several months. However, USA cancelled the agreement, claiming that USA had a policy of not selling to wireless and had mistakenly believed that Telecable was a hard wired system. In their March 28, 1990, letter response to follow up questions from the Los Angeles field hearing, USA

states that it distributes its programming to MMDS systems.

j/ The WCA claims that ESPN has refused to enter into an agreement with WCTV, the wireless cable operator in Tampa Bay, justifying its actions on the grounds that WCTV's operations manager was formerly employed by a wholly unrelated wireless company that sued ESPN after ESPN unilaterally stopped providing service. ESPN, in its reply comments, states that the WCA has misstated the facts regarding ESPN's relationship with WCTV. ESPN claims that it was forced to and successfully sued Skyview, Inc. of Belleville, WI, after its president (a current WCTV minority owner and operations manager) intentionally obtained unauthorized access to the ESPN service through the use of a consumer Videocipher II decoder for use on his MMDS system from 7/1/88 to 6/24/89. The "suit" referenced by WCA relates to Skyview's counterclaims alleging violations of the Wisconsin Fair Dealership Law and antitrust law. The counterclaims were dismissed at summary judgment and an order and damage award was thereafter entered against Skyview for its illegal activity. ESPN states that, under such circumstances, it is hesitant to enter into an agreement with WCTV.

k/ Magnavision stated that in 1986, Showtime's policy was not to issue licenses to MMDS. In 1988, Showtime refused sale again stating that MMDS technology is "too new and largely untested." In 1989, Showtime stated that it was testing wireless cable carriage by selling to Microband and that, in any event, Magnavision would have to provide Showtime a substantial amount of information about Magnavision before Showtime would consider a service order.

l/ Disney wanted assurances of protection against signal piracy along with price and growth projections.

m/ TNT refused service in 1989, saying that TNT might be available in the future.

n/ A&E informed Magnavision that its policy is not to serve MMDS. It will only deal with cable systems.

o/ ESPN refused to sell to Magnavision on the basis that it would license its programming to MMDS only when MMDS operators can "present unique test cases or (markets) to us." See footnote e.

p/ General "red-lining" to zip codes where cable exists.

q/ Refused to sell in 1988 because of its stated fear that MMDS has signal security problems.

r/ Movietime declined to sell and stated that it is currently reviewing its sales policy and its guidelines for affiliation.

s/ Must purchase (at a substantial markup) from cable operator in the same area.

t/ Refused to sell at all to the private cable industry. However, commenter states that service might become available. Cablevision states that it does sell its programming to the private cable industry.

u/ SMATV pays for MTV, NICK, and VH1 on a per subscriber basis, whereas cable operators receive discounts for a combined purchase of all three services.

v/ USA requires SMATV to pay per home passed, whereas cable pays per subscriber.

1/ The information about Magnavision was obtained from the comments it submitted. The information about the other MMDS systems was obtained from the comments submitted by the Wireless Cable Association (WCA), a trade association of MMDS operators.

Table X

Wireless Cable Systems' Access to Specific Program Networks 1/

Wireless Systems:	<---------Cable Program Network----------> HBO	ESPN	Showtime	TNT	Sports Channel	Regional Sports Channel
Carry Unrestricted	5	11	6	1	4	5
Carry Restricted	1	6	0	0	1	0
Request Pending	1	1	0	0	1	0
Unavailable	25	14	26	31	26	27
Total Systems Surveyed	32	32	32	32	32	32

Note: The wireless cable system carrying TNT, PacWest in Sacramento, was recently notified that service would be terminated.

Table XI

Sample Rate Comparisons Between Wireless Cable and Cable 1/
(cents per subscriber)

	Top Wireless Rate	Top Cable Rate	Wireless Premium
CNN	$.50	$.28	78.6%
USA	.38	.23	65.2%
Nickelodeon	.35	.22	59.1%
MTV	.35	.22	59.1%
Nashville	.35	.20	75.0%
A&E	.15	.11	36.4%
Headline News	.50	.00	-

1/ Information obtained in the comments of the Wireless Cable Association.

Table XII

Rate Comparisons: Mid-Atlantic Communications' Cable Systems vs. SMATVs 1/

Programmer	SMATV	Cable System	SMATV Premium
HBO *	$6.25 per sub **	$4.00/mo. per sub a/	56.2%
Cinemax *	6.50 per sub **	3.86/mo. per sub	94.5%
Nick *	0.29 per sub	0.17 per sub	70.5%
MTV *	0.29 per sub	0.17 per sub	70.5%
USA	0.18 per passing	0.18 per sub	not comparable
FNN	0.17 per sub	0.055 per sub	209%
HTS	1.50 per sub	0.75 per sub	100%
CNN *	0.33 per sub	0.25 per sub	32.0%
ESPN *	0.47 per sub	0.32 per sub	46.9%

1/ Information obtained from the comments of the National Satellite Programming Network, Inc., et al.

a/ Sub = subscriber

* Cable network has vertical relationship with a cable MSO.

** Sold by cable operator

Table XIII

MSO CARRIAGE OF OWNED NETWORKS 1/

Network	MSO with Ownership Ints. in Network	Carriage Percentage By Systems with Network Ownership Interest	Carriage Percentage By Systems without Network Ownership Interest	Difference in Carriage Percentage
BET	TCI, Time Warner	53.6%	41.8%	11.8%
CNN	(a)	99.5	99.4	0.1
CVN	(b)	78.4	25.0	53.4
DSCV	(c)	88.1	85.1	3.0
HLN	(a)	80.9	73.3	7.6
LIF	Viacom, Hearst	90.0	90.0	0.0
MTV	Viacom	90.0	96.4	-6.4
NAN	Viacom	100.0	91.5	8.5
NICK	Viacom	100.0	100.0	0.0
VH1	Viacom	80.0	70.5	9.5
WTBS	(a)	93.6	92.2	1.4
Average of Basic Networks		86.7%	78.7%	8.1%
AMC*	Cablevision Systems, TCI, United Cable	62.7	29.2	33.6
BRVO*	Cablevision Systems	100.0	17.2	82.8
CMAX	Time Warner	96.2	79.7	16.5
HBO	Time Warner	100.0	99.7	0.3
SHOW	Viacom	90.0	83.8	6.2
TMC	Viacom	90.0	58.7	31.3
Average of Premium Networks		89.8%	61.4%	28.4%
Average of All Networks		87.8%	72.6%	15.3%

1/ This table was derived from the Klein study. The Klein study was compiled based on information obtained in 1988 and 1989. Klein's table was edited to reflect certain ownership changes since that time.

(a) TCI, Time Warner, United Artists, United Cable, Heritage, TCI-Taft, Cablevision Systems, Continental, Jones Intercable, Lenfest, Sammons, Storer, Times Mirror, TKR Cable, Viacom, Telecable, Centel, Scripps Howard (Telescripps).

(b) TCI, Time Warner, Cablevision Systems, Colony, Continental, Newhouse, Rogers Communications, Sammons, Times Mirror, Viacom, Daniels & Associates, Cooke Cablevision, American Cablevision, Adam Corporation, United Artists, Heritage.

(c) TCI, Cox, Newhouse, United Cable.

* Hybrid services (offered both as basic and premium).

Table XIV

CARRIAGE BY VERTICALLY INTEGRATED MSOs OF NETWORKS IN WHICH THEY HAVE NO OWNERSHIP INTERESTS 1/

Network	Vert. Integrated MSO's w/no Ownership Ints. in the Particular Network	Carriage Percentage By Vertically Integrated MSO's w/no Ownership Interests in the Network	Carriage Percentage By Systems with No Ownership Interests in Any Networks (153 Systems)	Difference in Carriage Percentage
AEN	TCI, T/W, Viacom, CVS	87.9%	81.7%	6.2%
BET	Viacom, CVS	50.0	31.4	18.6
CSPN*	TCI, T/W, Viacom, CVS	94.8	71.2	23.6
DSCV	T/W, Viacom, CVS	85.8	85.0	0.0
ESPN	TCI, T/W, Viacom, CVS	100.0	100.0	0.0
FNN	TCI, T/W, Viacom, CVS	74.1	63.4	10.7
LIF	TCI, T/W, CVS	96.2	79.1	17.1
MTV	TCI, T/W, CVS	98.1	93.5	4.6
NAN	TCI, T/W, CVS	87.0	94.4	-7.4
NICK	TCI, T/W, CVS	100.0	100.0	0.0
TNN	TCI, T/W, Viacom, CVS	89.7	93.5	-3.8
TWC	TCI, T/W, Viacom, CVS	82.8	72.5	10.2
USAN	TCI, T/W, Viacom, CVS	99.1	96.7	2.4
VH1	TCI, T/W, CVS	62.3	69.3	-7.0
WGN	TCI, T/W, Viacom, CVS	54.3	54.2	0.1
Average of Basic Networks		84.5%	79.7%	5.1%
AMC**	T/W, Viacom	47.2	21.6	25.7
BRVO**	TCI, T/W, Viacom	17.9	13.1	4.8
CMAX	TCI, Viacom, CVS	77.8	76.5	1.3
DSNY	TCI, T/W, Viacom, CVS	97.4	92.8	4.6
GALA**	TCI, T/W, Viacom, CVS	9.5	3.3	6.2
HBO	TCI, Viacom, CVS	100.0	99.3	0.7
SHOW	TCI, T/W, CVS	84.0	75.8	8.1
TMS	TCI, T/W, CVS	50.0	56.2	-6.2
Average of Premium Networks		60.5%	54.8%	5.6%
Average of All Networks		76.5%	71.4%	5.2%

1/ This table was derived from the Klein study. The Klein study was compiled based on information obtained in 1988 and 1989. Klein's table was edited to reflect certain ownership changes since that time.

* Cable affiliates provide 95 percent of the funding for C-SPAN, but have no ownership or program control interests.

** Hybrid services (offered both as basic and premium).

Table XV

History of Major MSO Cable Network Ownership Since 1975

(table generated from responses of the MSO's listed below that were sent letters requesting information regarding their cable programming interests)

Year	TCI	Viacom	<Time Warner-> ATC	Warner	Conti-nental	Cox	Com-cast	Cable-Vision	New Chan.
1975	-	-	-	a/	-	-	-	-	-
1976	-	b/	-	-	-	-	-	-	-
1977	-	-	-	c/	-	-	-	-	-
1978	-	-	d/	-	-	-	-	-	-
1979	e/	f/	-	g/	-	-	-	-	-
1980	-	-	h/	i/	-	-	-	-	-
1981	-	-	j/	k/	-	l/	-	-	-
1982	m/	n/	-	-	-	-	-	o/	-
1983	-	p/	-	q/	-	-	-	r/	-
1984	s/	t/	-	u/	-	v/	-	w/	-
1985	-	x/	y/	z/	-	-	-	aa/	-
1986	bb/	cc/	dd/	ee/	-	ff/	-	gg/	hh/
1987	ii/	-	jj/	kk/	ll/	mm/	nn/	oo/	pp/
1988	qq/	rr/	ss/	tt/	uu/	vv/	ww/	xx/	yy/
1989	zz/	aaa/	bbb/	ccc/	ddd/	eee/	fff/	ggg/	hhh/

Footnotes

1975

a/ Warner created the Movie Channel, originally known as the Star Channel.

1976

b/ Showtime Entertainment formed as a wholly-owned subsidiary of Viacom International Inc.

1977

c/ Pinwheel was launched by Warner as a young people's (ages 2-15) entertainment service.

1978

d/ Time Warner has wholly owned HBO during the entire period. HBO created Take 2 in December 1978 until it closed operations September 1980.

1979

e/ TCI became founding investor in Black Entertainment Television, Inc.

f/ In January, 1979, Showtime Entertainment became a partnership of Viacom International and Teleprompter, with each company owning 50%.

g/ Pinwheel was relaunched by Warner as Nickelodeon.

1980

h/ Time Warner-owned HBO created Cinemax in August 1980.

i/ Warner Amex Satellite Entertainment Company ("WASEC") was formed to market and distribute programming interests owned jointly by Warner and American Express Company ("AMEX").

1981

j/ Time Warner acquired 1/3 interest in USA network.

k/ MTV was launched in August by a partnership of subsidiaries of Warner and American Express as a rock music video service.

l/ Cox acquired 20% of Spotlight December 1981.

1982

m/ TCI acquired 11.7% of the Pennsylvania Educational Communications Systems.

n/ In November, Viacom acquired from the subsidiary of Group W its 50% partnership interest in Showtime Entertainment. Also, Viacom and two individuals (Mr. Jeffery Reiss and Dr. Art Ulene) formed Cable Health Network, Inc. Viacom was a minority stock-holder but assumed a significant management and financial role in the venture and had rights to increase its ownership. In June, the Cable Health Network was launched, producing programming related to health and life-style issues.

o/ Cablevision's programming arm (Rainbow Program Enterprises (RPE)) and Playboy Enterprises create a joint venture to own and operate Escapade (later renamed the Playboy Channel).

1983

p/ In November, Cable Health Network, Inc., owned in part by Viacom, became a one-third general partner with a one-third management interest in a partnership with Hearst/ABC Services (itself a partnership of subsidiaries of the Hearst Corporation and American Broadcasting Companies Inc.). The Cable Health Network and Daytime Service programming networks were thereby merged into a new programming service called Lifetime. Also, in 1983, Viacom entered into an agreement with subsidiaries of Warner Communications Inc. ("Warner") and the American Express Company ("American Express") whereby effective in September, 1983 the business of Showtime Entertainment was merged with the business of the The Movie Channel (formerly operated by Warner and American Express) as Showtime/The Movie Channel Inc. ("ST/TMC") (now SNI). (The Movie Channel commenced operation in 1973 as the The Starchannel and was first distributed nationally as The Movie Channel in 1979.) Viacom contributed to this venture its 100% ownership in Showtime Entertainment in exchange for 50% of the equity in ST/TMC and other consideration. Warner held 40.5% and American Express held 9.5% of the remaining equity in ST/TMC.

q/ In September 1983, Warner and Viacom formed a new corporation, Showtime/The Movie Channel. Also, Warner Amex Satellite Entertainment Co. created Home Sports Entertainment (HSE) internally in 1983.

r/ Effective January 1, 1983, Cablevision's program affiliate Rainbow Programming Enterprises (RPE) formed a partnership with New England Prime Cable Network which acquired all the assets of PRISM New England, a sports-movie service serving New England. The movies were discontinued and the service was renamed SportsChannel New England. RPE acquired a 40% pre-payout and 50% post-payout interest in the service consisting of both general and limited partnership interests. On June 1, 1983, sold to subsidiaries of the Washington Post, 50% of RPE's interest in SportsChannel New York and SportsChannel New England. In October 1983, RPE sold its remaining interest in the Playboy Channel to Playboy Enterprises, but continued to distribute the Playboy Channel until April 1986. On October 18, 1983, RPE and a subsidiary of the Washington Post Company formed a partnership which acquired The PRISM Company, the owner of PRISM, a sports-movie service serving the Philadelphia area. RPE acquired a 50% general partnership interest in the service.

1984

s/ TCI sold interest in Spotlight Service, Inc.

t/ In February, ST/THC, owned by Viacom, acquired the assets of the Spotlight Partnership from its cable operator owners (Cox Cable Communications, Inc., TCI, Storer Communications Incorporated, and Times-Mirror Cable Television,Inc.). Spotlight was a pay programming service marketed to the cable systems owned by the cable operator owners. Pursuant to the asset purchase, subscribers to the Spotlight service became subscribers (subject to their approval) to either Showtime or The Movie Channel. Also, in 1984, Viacom launched Lifetime.

u/ On July 16, 1984, Warner sold Home Sports Entertainment (HSE) to a venture controlled by Houston Sports Associates. The assets of MTV, VH-1 and Nickelodeon were transferred to a new corporation, MTV Networks, Inc. ("MTVN"). Pursuant to a public offering, 5,125,000 shares of MTVN were sold to the public in August. Warner and American Express collectively retained ownership of 66.1% of the outstanding capital stock of MTVN.

v/ Cox sold holdings in Spotlight.

w/ On January 1, 1984, RPE, owned by Cablevision, and a subsidiary of the Washington Post Company formed a partnership which entered into a rights agreement with, and succeeded to the business of SportsVision of Chicago, which operated a sports programming service in the Chicago area called SportsVision.

1985

x/ **Viacom** increased its ownership in Cable Health Networks, Inc. (the one-third general partner in the Lifetime service) to 80%. Also, in 1985, Viacom purchased from Warner the 50% equity interest in ST/TMC that it did not then own (Warner had previously purchased the 9.5% interest of American Express). In January, VH-1 was launched by MTV as a music video service, programmed to complement MTV. In July, Nick-at-Nite was launched by Nickelodeon extending Nickelodeon's service to 24-hours for certain subscribers. Nick-at-Nite serves general audiences. In November, **Viacom** acquired from Warner 66.5% of the ownership interest in MTV Networks Inc. ("MTVN"), owner and operator of MTV, Nickelodeon and VH-1. (Warner had previously purchased from American Express its interest in the venture which operated these services). The remaining 33.5% of MTVN shares were publicly held. In November, **Viacom** through a division of SNI, initiated a national satellite delivered pay-per-view service, Viewer's Choice, which enabled cable subscribers to view theatrical features and special events on a program-by-program basis.

y/ HBO Inc., owned by **ATC**, began acquiring stock in Black Entertainment Television.

z/ In August of 1985, **Warner** acquired AMEX's interest in MTVN. Warner's interest in MTVN was sold to Viacom in November of 1985.

aa/ On January 25, 1985, RPE, owned by **Cablevision**, and The Washington Post Company sold to subsidiaries of CBS one-third of their interests in SportsChannel New York, SportsChannel New England, PRISM and SportsChannel Chicago. This transaction left RPE with a 33.5% general partnership interest in SportsChannel New York, a one-third general partnership interest in PRISM and SportsChannel Chicago and 13.33% pre-payout and 16.66% post-payout interest in SportsChannel New England. Also, on January 25, 1985, RPE sold to subsidiaries of CBS, 50% if RPE's interests in AMC and Bravo, leaving RPE with a 50% general partnership interests in such services.

1986

bb/ **TCI** acquired 49.22% of the Discovery Channel; 100% of X*press Information Services, Ltd.; and, 33.3% of the Z Channel (premium sports and movie channel). Acquired and sold Uptown (premium channel).

cc/ In March, **Viacom** acquired the remaining 33.5% of the shares of MTVN, a process whereby MTVN became a wholly-owned subsidiary of Viacom (MTVN was subsequently merged into Viacom and currently exists as one of its operating divisions, MTV Networks). In June, a second national pay-per-view channel, Viewer's Choice 2, was launched by Viewer's Choice.

dd/ **ATC** began acquiring stock in the QVC Network and the CVN Network. HBO Inc. created Festival and launched it in May.

ee/ **Warner** and Investors acquired equity interest in CVN over the period from October 21, 1986 through May, 1989.

ff/ **Cox** acquired 15% of America's Shopping Channel and 9.9% of the Discovery Channel.

gg/ In December 1986, **Cablevision** acquired certain limited partnership interests in RPE from outside investors, so that Cablevision now owns a 95.68% pre-payout interest and a 94.77% post-payout interest in RPE.

hh/ **NewChannels** acquired over 3 million shares in the Discovery Channel.

1987

ii/ **TCI** acquired 50% of American Movie Classics.; 36.6% of the Fashion Channel Network, Inc.; 10.5% of the Movietime Channel, Inc.; 22.7% of QVC Network, Inc.; and, 37.5% of Think Entertainment. Acquired interest in Turner Broadcasting System, Inc. Launched KBL Entertainment, Inc. (regional sports). Sold interest in the Z Channel.

jj/ **ATC** began acquiring stock in the Pay-Per-View Network, Inc.; Turner Broadcasting; and, the Fashion Channel; sold interest in the USA Network.

kk/ **Warner's** interest in TBS was acquired over a period beginning in June, 1987 through May, 1988.

ll/ **Continental** acquired 12% of Viewers Choice, Inc.

mm/ **Cox** acquired an additional 15% of America's Shopping Channel; 3.6% of the Discovery Channel; and, an initial 20% of Viewers Choice.

nn/ **Comcast** acquired various amounts of stock in the QVC Network during May and June.

oo/ On January 1, 1987 and August 25, 1987, **Cablevision's** programming affiliate Rainbow Programming Holdings, Inc. (RPHI) acquired from The Washington Post Company and CBS, all the foregoing interests previously sold. As a result, collectively, RPE and RPHI owned 100% of the partnership interests in such companies. Also on January 1, 1987, RPE sold to a subsidiary of Tele-Communications, Inc. 50% of RPE's interest in AMC, leaving RPE with a 50% general partnership interest.

pp/ **NewChannels** acquired another 4 million shares in the Discovery Channel and 5.7% of the outstanding shares of the Information Channel. NewChannels was an original investor in the Pay-Per-View Network when it purchased 20% of the shares in July.

1988

qq/ **TCI** acquired 20% of Prevue Guide, Inc.; 100% of Southern Satellite Systems, Inc.; TEMPO Sound, Inc. and TEMPO Television, Inc.

rr/ In November, certain assets of Viewer's Choice 1 and 2 were combined with Home Premiere Television and **Viacom** thereby acquired what is currently a one-ninth interest in PPVN which through a subsidiary owns

and operates Home Premiere Television (now called Viewer's Choice), a national pay-per-view service. Together with Viacom, PPVN is owned directly or by subsidiaries of these other companies: Continental Cablevision Investments, Inc.; Cox Communications Inc.; Telecable Corporation; Newchannels Corporation; ATC-PPV Inc.; Walt Disney Pictures and Television; Times-Mirror Cable Television; and Comcast Cable Communications, Inc. (The latter three entities became stockholders in PPVN subsequent to Viacom's obtaining its original one-sixth interest.) Viacom is one of nine board members. Also in 1988, Viacom further increased its ownership in Cable Health Network, Inc. to 100%.

ss/ **ATC** acquired interests in Movietime, Inc. and the Sunshine Network.

tt/ **Warner's** interest in Movietime was acquired over a period beginning February 16, 1988 through November 1, 1989.

uu/ **Continental** acquired 11% of the Movietime Channel, Inc.; 18% of the Sunshine Network, Inc.; and, 33% of the Z-Channel Limited Partnership.

vv/ **Cox** acquired an additional 0.3% of the Discovery Channel; sold 20% of common voting stock of Viewers Choice but lent company over $2 million to retain a total of 12.5% ownership; and, acquired an initial interest in Movietime.

ww/ **Comcast** purchased 14,000 shares of common stock in the Sunshine Network, Inc.

xx/ On April 19, 1988, the partners not affiliated with RPE, owned by **Cablevision**, and RPHI withdrew from the partnership in SportsChannel New England. As a result, RPE and RPHI collectively own 100% of the general and limited partnership interests in the service.

yy/ **NewChannels** acquired over 3 million shares in the Movietime Channel Inc.; acquired additional shares in the Pay-Per-View Network; and acquired stock in the Video Jukebox Network Inc.

1989

zz/ **TCI** acquired 60% of Affiliated Regional Communications, Ltd.; 11.7% of International Cablecasting Technologies, Inc. Founding investor in Prime Time Tonight, Inc. (35%). Launched TCI Bay Area Sports, Inc.; TCI Northwest Cable Sports, Inc.; and, TCI Sports, Inc. Sold TEMPO Sound, Inc. and TEMPO Television, Inc.

aaa/ **Viacom** and TCI entered a letter of intent with respect to TCI's purchase of a 50% equity interest in the business of SNI (formerly ST/TMC). Also, in 1989, Viacom (on behalf of a subsidiary yet to be formed) and TCI Bay Area Sports, Inc. agreed to form a partnership to operate a regional sports network in the San Francisco Bay Area and the surrounding counties. In the same month Viacom and TCI Northwest Cable, Inc. agreed to enter into a separate partnership to operate a regional sports network in the Seattle/Tacoma, Washington area. Definitive agreements are currently in negotiation. The PSN service

for San Francisco was launched in September 1989, sports programming, which at the time was not formally part of Prime, was launched in 1988 in Seattle/Tacoma prior to a formal agreement between Viacom and TCI to form the Prime partnership.

bbb/ Festival ceased operations in December. In October, ATC's interest in CVN were converted to QVC as a result of the merger of QVC and CVN. The Fashion Channel ceased operation. HBO created the Comedy Channel and launched it in December.

ccc/ On October 31, 1989, Warner's interest in CVN were converted into an interest in QVC pursuant to a merger of CVN with QVC. Warner's interest in QVC was acquired over a period from July through December, 1989. Also, in 1989, HSE was sold to a partnership made up of affiliates of Telecommunications, Inc. and Daniels & Associates. Warner holds 23,171 shares of Class B common stock of The Fashion Channel Network, Inc., representing approximately 0.93% of the outstanding shares. The Fashion Channel ceased operations in 1989.

ddd/ Continental sold holdings in the Z-Channel.

eee/ Cox acquired an additional 10.76% of the Discovery Channel resulting in a total ownership of 24.6%; lent America's Shopping Channel over $3 million; acquired additional stock in Movietime resulting in a 11.4% total interest; and, acquired an initial 12.5% interest in Prime Time Tonight.

fff/ Comcast acquired additional stock in the QVC Network; purchased stock and note in the Pay Per View Network Holding Co.

ggg/ On March 20, 1989, RPHI (a subsidiary of Cablevision) acquired certain of the assets of Z Channel a sports-movie service serving the Los Angeles area. The movies were discontinued and the service was renamed SportsChannel Los Angeles. On April 20, 1989, RPHI acquired a 49.5% general partnership interest in CNBC in connection with NBC's acquisition of interests in programming services from RPI and RPE described below. The sports channel in Chicago (SportsVision) continued until 1989 at which time the service was renamed SportsChannel Chicago. RPE acquired a 50% general partnership interest in the service. Also on April 20, 1989, RPE and RPHI sold to subsidiaries of NBC, 50% of RPE's and RPHI's respective interests in all the SportsChannel services, Bravo and News 12 Long Island, leaving RPE and RPHI collectively with a 50% general partnership interest in SportsChannel New York, Prism, SportsChannel Chicago, Sports-Channel Florida, SportsChannel Ohio, SportsChannel Los Angeles, SportsChannel America, Bravo and News 12 and a 50% general and limited partnership interest in SportsChannel New England.

hhh/ NewChannels acquired more stock in the Movietime Channel now totaling 11.3% of the outstanding stock; acquired more stock in the Video Jukebox Network Inc. now totaling 16% of the outstanding shares; acquired more stock in the Discovery Channel now totaling 24.8% of the outstanding shares; and acquired 12.5% of the outstanding shares in Prime Time Tonight.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: June 24, 1994

FEE DECISIONS OF THE MANAGING DIRECTOR AVAILABLE TO THE PUBLIC

The Managing Director is responsible for fee decisions in response to requests for waiver or deferral of fees as well as other pleadings associated with the fee collection process. On a monthly basis, a public notice is released and the entire text of these fee decisions is published in the FCC Record.

The decisions are placed in General Docket 86-285 and are available for public inspection. A copy of the decision is also placed in the appropriate docket, if one exists.

The following Managing Director fee decisions are released for public information:

Bruce David Blanchard Ltd Partnership - Request for refund of a hearing fee for a FM station at Ocean City, Maryland - **Granted** (May 16, 1994).

KRIG, Inc. - Request for refund of a filing fee for a FM station at Nowata, Oklahoma - **Granted** (May 6, 1994).

Meridian Broadcasting Partnership - Request for refund of a hearing fee for a new FM station at Meridian, Mississippi - **Granted** (May 6, 1994).

NOTE: ANY QUESTIONS REGARDING THIS REPORT SHOULD BE DIRECTED TO THE PREPARER, CLAUDETTE PRIDE, CHIEF, FEE SECTION ON (202) 632-0241.

FEDERAL COMMUNICATIONS COMMISSION

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

MAY 16 1994

Mr. Bruce David Blanchard
Bruce David Blanchard Ltd. Partnership
13001 Wight St. Unit #501
Ocean City, Maryland 21842

Re: File No. BPH-901226MA
FM Application

Dear Mr. Blanchard:

This is in response to your request for refund of the fee submitted in the above-referenced matter.

Your request is granted. We have reviewed the facts surrounding your filing and have concluded that a refund is warranted pursuant to Section 1.1111 of the Commission's rules. 47 C.F.R. §1.1111. The subsection checked below is specifically applicable to your request.

_____ No fee is required for the above referenced submission (§1.1111(a)(1)).

_____ An insufficient fee has been submitted with the application/filing (§1.1111(a)(2)).

_____ The applicant cannot fulfill the prescribed age requirement (§1.1111(a)(4)).

_____ The Commission has adopted a new rule that has nullified the application after its acceptance for filing (§1.1111(a)(4)).

_____ A new law or treaty has rendered useless a grant or other positive disposition of the application (§1.1111(a)(4)).

_____ The application was not timely filed in accordance with the filing window as established by the Commission (§1.1111(a)(6)).

_____ In the case of a broadcast applicant, the application was granted without being designated for hearing (§1.1111(b)(1)).

___X___ In the case of a broadcast applicant, the application was dismissed prior to designation for hearing or in the order designating the case for hearing (§1.1111(b)(2)).

_____ In the case of a broadcast applicant, the application was dismissed for failure to file a Notice of Appearance (§1.1111(b)(2)).

_____ In the case of a broadcast applicant, the applicant was the only applicant in the proceeding to file a Notice of Appearance and the application was immediately grantable (§1.1111(b)(3)).

_____ In the case of a broadcast applicant, the applicant was the only applicant in the proceeding who filed a Notice of Appearance and the application was immediately grantable upon deletion of a matter(s) specified in the designation order and requiring resolution (§1.1111(b)).

_____ In the case of a broadcast applicant, a settlement agreement filed with the presiding judge by the Notice of Appearance deadline provided for the dismissal of all but the above-referenced application, and the application was immediately grantable (§1.1111(b)(4)).

_____ In the case of a broadcast applicant, a settlement agreement filed with the presiding judge by the Notice of Appearance deadline provided for dismissal of all but the above-referenced application and the application was immediately grantable upon deletion of a matter(s) specified in the designation order and requiring resolution (§1.1111(b)(4)).

A check, made payable to the maker of the original check and drawn in the amount of $6,760, will be sent to you at the earliest practicable time. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 632-0241.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

MAY 6 1994

Bruce H. Campbell
KRIG, Inc.
1740 S.E. Washington Blvd., Ste. 1A
P.O. Box 877
Bartlesville, Oklahoma 74005

Re: Return consent to assignment application
for Radio Station KRIG(FM)
Nowata, Oklahoma
Fee Control # 9309078350381001

Dear Mr. Campbell:

This is in response to your request for refund of the fee submitted in the above-referenced matter.

Your request is granted. We have reviewed the facts surrounding your filing and have concluded that a refund is warranted pursuant to Section 1.1111 of the Commission's rules. 47 C.F.R. §1.1111. The subsection checked below is specifically applicable to your request.

___X___ No fee is required for the above referenced submission (§1.1111(a)(1)).

_____ An insufficient fee has been submitted with the application/filing (§1.1111(a)(2)).

_____ The applicant cannot fulfill the prescribed age requirement (§1.1111(a)(4)).

_____ The Commission has adopted a new rule that has nullified the application after its acceptance for filing (§1.1111(a)(4)).

_____ A new law or treaty has rendered useless a grant or other positive disposition of the application (§1.1111(a)(4)).

_____ The application was not timely filed in accordance with the filing window as established by the Commission (§1.1111(a)(6)).

_____ In the case of a broadcast applicant, the application was granted without being designated for hearing (§1.1111(b)(1)).

_____ In the case of a broadcast applicant, the application was dismissed prior to designation for hearing or in the order designating the case for hearing (§1.1111(b)(2)).

_____ In the case of a broadcast applicant, the application was dismissed for failure to file a Notice of Appearance (§1.1111(b)(2)).

_____ In the case of a broadcast applicant, the applicant was the only applicant in the proceeding to file a Notice of Appearance and the application was immediately grantable (§1.1111(b)(3)).

_____ In the case of a broadcast applicant, the applicant was the only applicant in the proceeding who filed a Notice of Appearance and the application was immediately grantable upon deletion of a matter(s) specified in the designation order and requiring resolution (§1.1111(b)).

_____ In the case of a broadcast applicant, a settlement agreement filed with the presiding judge by the Notice of Appearance deadline provided for the dismissal of all but the above-referenced application, and the application was immediately grantable (§1.1111(b)(4)).

_____ In the case of a broadcast applicant, a settlement agreement filed with the presiding judge by the Notice of Appearance deadline provided for dismissal of all but the above-referenced application and the application was immediately grantable upon deletion of a matter(s) specified in the designation order and requiring resolution (§1.1111(b)(4)).

A check, made payable to the maker of the original check and drawn in the amount of $565, will be sent to you at the earliest practicable time. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 632-0241.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

MAY 6 1994

Harry C. Martin, Esq.
1001 22nd Street, N.W., Suite 350
Washington, D.C. 20037

Re: Meridian Broadcasting Partnership
Debtor-In-Possession
Fee Control # 9208058170377001

Dear Mr. Martin:

This is in response to your request for refund of the fee submitted in the above-referenced matter.

Your request is granted. We have reviewed the facts surrounding your filing and have concluded that a refund is warranted pursuant to Section 1.1111 of the Commission's rules. 47 C.F.R. §1.1111. The subsection checked below is specifically applicable to your request.

_____ No fee is required for the above referenced submission (§1.1111(a)(1)).

_____ An insufficient fee has been submitted with the application/filing (§1.1111(a)(2)).

_____ The applicant cannot fulfill the prescribed age requirement (§1.1111(a)(4)).

_____ The Commission has adopted a new rule that has nullified the application after its acceptance for filing (§1.1111(a)(4)).

_____ A new law or treaty has rendered useless a grant or other positive disposition of the application (§1.1111(a)(4)).

_____ The application was not timely filed in accordance with the filing window as established by the Commission (§1.1111(a)(6)).

__X__ In the case of a broadcast applicant, the application was granted without being designated for hearing (§1.1111(b)(1)).

_____ In the case of a broadcast applicant, the application was dismissed prior to designation for hearing or in the order designating the case for hearing (§1.1111(b)(2)).

_____ In the case of a broadcast applicant, the application was dismissed for failure to file a Notice of Appearance (§1.1111(b)(2)).

_____ In the case of a broadcast applicant, the applicant was the only applicant in the proceeding to file a Notice of Appearance and the application was immediately grantable (§1.1111(b)(3)).

_____ In the case of a broadcast applicant, the applicant was the only applicant in the proceeding who filed a Notice of Appearance and the application was immediately grantable upon deletion of a matter(s) specified in the designation order and requiring resolution (§1.1111(b)).

_____ In the case of a broadcast applicant, a settlement agreement filed with the presiding judge by the Notice of Appearance deadline provided for the dismissal of all but the above-referenced application, and the application was immediately grantable (§1.1111(b)(4)).

_____ In the case of a broadcast applicant, a settlement agreement filed with the presiding judge by the Notice of Appearance deadline provided for dismissal of all but the above-referenced application and the application was immediately grantable upon deletion of a matter(s) specified in the designation order and requiring resolution (§1.1111(b)(4)).

A check, made payable to the maker of the original check and drawn in the amount of $6,760, will be sent to you at the earliest practicable time. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 632-0241.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of	)	
	)	
Implementation of Section 309(j)	)	PP Docket No. 93-253
of the Communications Act -	)	
Competitive Bidding	)	

THIRD REPORT AND ORDER

Adopted: April 20, 1994 Released: May 10, 1994

By the Commission: Commissioner Barrett concurring and issuing a statement.

TABLE OF CONTENTS

		Paragraph
I.	INTRODUCTION	1
II.	BACKGROUND AND AUCTION ELIGIBILITY	4
III.	COMPETITIVE BIDDING DESIGN	
A.	Narrowband PCS Service Rules	9
B.	General Competitive Bidding Rules	12
C.	Competitive Bidding Design for Narrowband PCS Licenses	16
1.	Simultaneous Multiple Round Bidding	17
2.	Open Sequential and Single Sealed Bidding	21
3.	Combinatorial Bidding	23
D.	Bidding Procedures	25
1.	Grouping of Licenses	25
2.	Bid Increments	30
3.	Stopping Rules for Multiple Round Auctions	33
4.	Activity Rules	36

IV. PROCEDURAL, PAYMENT AND PENALTY ISSUES 41
A. Pre-Auction Procedures and Bidder and Licensee Qualifications 41
B. Upfront Payment 45
C. Down Payment and Full Payment for Licenses Awarded by Competitive Bidding 48
D. Bid Withdrawal, Default and Disqualification 49
E. Procedures in Other Auction Designs 58

V. REGULATORY SAFEGUARDS 61
A. Unjust Enrichment Provisions 61
B. Performance Requirements 63
C. Rules Prohibiting Collusion 64

VI. TREATMENT OF DESIGNATED ENTITIES 66
A. Introduction 66
1. Bidding Credits 72
2. Tax Certificates 81
3. Installment Payments 86
VI. CONCLUSION 90

VIII. PROCEDURAL MATTERS AND ORDERING CLAUSES 91
A. Final Regulatory Flexibility Analysis 91
B. Ordering Clauses 95

APPENDIX - FINAL RULES

I. INTRODUCTION

1. On August 10, 1993, the Omnibus Budget Reconciliation Act of 1993 (the "Budget Act") added a new section 309(j) to the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-713 (the "Communications Act"). This amendment to the Communications Act gave the Commission express authority to employ competitive bidding procedures to choose from among mutually exclusive applications for initial licenses. The Commission's March 8, 1994 Second Report and Order[1] establishes general rules and procedures and a broad menu of competitive bidding methods to be used for all auctionable services. We indicated in the Second Report and Order that in subsequent Reports and Orders we would set forth specific

[1] Second Report and Order in PP Docket No. 93-253, FCC 94-61 (released April 20, 1994) ("Second Report and Order"). A list of the commenters in this proceeding is attached as Appendix A to the Second Report and Order.

competitive bidding rules that would be applicable to individual services.

2. In this Third Report and Order, we adopt service-specific rules for competitive bidding on licenses to be awarded for Personal Communications Services in the 900 MHz band ("narrowband PCS").[2] Because of the significant interdependence among narrowband PCS licenses and the relatively high expected value of such licenses, we will award most narrowband PCS licenses through a sequence of simultaneous multiple round auctions. However, we may alternatively use oral sequential or single round sealed bidding to award certain narrowband PCS licenses if we determine that the operational complexity or administrative costs associated with simultaneous auctions are excessive relative to the expected value of the licenses to be awarded. Generally, we will follow the payment and procedural rules adopted in the Second Report and Order in conducting narrowband PCS auctions. In addition, we adopt general procedural and processing rules for the narrowband PCS service based on Part 22 of the Commission's rules.

3. In this Report and Order we also adopt a system of preferences designed to enhance access to the narrowband PCS spectrum and achieve the congressional directive that our competitive bidding rules ensure the opportunity of small businesses and businesses owned by women and minorities (designated entities) to participate in the auction process and in the provision of narrowband PCS services. Specifically, we will allow small businesses to pay for certain narrowband PCS licenses in installments over the term of the license. In addition, we will afford a 25 percent bidding credit to businesses owned by women and minorities bidding on certain specified narrowband PCS licenses.

II. BACKGROUND AND AUCTION ELIGIBILITY

4. Section 309(j) of the Communications Act, as amended, permits auctions only where (1) mutually exclusive applications for initial licenses or construction permits are accepted for filing by the Commission, (2) the principal use of the spectrum will involve or is reasonably likely to involve the receipt by the licensee of compensation from subscribers in return for enabling those subscribers to receive or transmit communications signals, and (3) the objectives set forth in Section 309(j)(3) would be promoted.

5. In the Second Report and Order, we concluded that narrowband PCS as a class of

---

[2] The Commission has allocated 3 MHz of spectrum in the 900 MHz band for narrowband PCS. Narrowband PCS encompasses mobile and portable radio communications services which can be used to provide a variety of paging and messaging services to individuals or businesses. See First Report and Order in Gen. Docket No. 90-314, 8 FCC Rcd 7162(1993), on reconsideration, Memorandum Opinion and Order in Gen. Docket No. 90-314, and ET Docket No. 92-100 and ET Docket No. 92-100, 9 FCC Rcd 1337 ("Narrowband PCS Order"), 47 C.F.R. Part 24, subpart D

service would satisfy the Section 309(j) criteria for auctionability. See Second Report and Order at ¶¶ 54-58. Specifically, based on the record in this proceeding and in GN Docket No. 90-314 and ET Docket No. 92-100, we concluded that the principal use of narrowband PCS spectrum, considered as a class, was reasonably likely to involve licensees receiving compensation from subscribers in return for enabling those subscribers to transmit or receive communications.

6. In addition, we concluded that competitive bidding for narrowband PCS licenses will promote the objectives set forth in Section 309(j)(3). We determined that the use of competitive bidding to award narrowband PCS licenses as compared to other licensing methods will speed the development and deployment of new services to the public with minimal administrative or judicial delays, and encourage efficient use of the spectrum as required by Section 309(j)(3)(A) and (D). In this regard we noted that auctions would award licenses quickly to those parties who value them most highly and who are thus most likely to introduce service rapidly to the public. Id. at ¶¶ 57-58.

7. We also concluded that competitive bidding would recover for the public a portion of the value of the spectrum, as envisioned in Section 309(j)(3)(C), because the only direct monetary compensation the public currently receives for use of the spectrum is, with few exceptions, the application fee paid by most Commission applicants. Id.

8. Finally, in accordance with Section 309(j)(3)(B), we determined that competitive bidding, in conjunction with our allocation and service rules, will promote access to new narrowband PCS services and technologies and disseminate licenses among a wide variety of applicants by encouraging participation by all qualified bidders. In this regard, we have adopted a set of open competitive bidding procedures, a wide variety of license types and sizes, and a menu of preferences designed to increase opportunities for designated entities who might otherwise face entry barriers. Id. at ¶¶ 106-115 and 231-257.

III. COMPETITIVE BIDDING DESIGN

A. Narrowband PCS Rules

9. The spectrum allocation, service definition and technical rules for narrowband PCS were completed by the Commission in the Narrowband PCS Order. The Commission defined narrowband PCS as a "family of mobile and portable radio communications services which could provide services to businesses and individuals, and be integrated with a variety of competing networks." See Narrowband PCS Order at ¶¶ 35-37. We anticipated that advanced paging and messaging services would be the predominant narrowband services provided. Three megahertz of spectrum were allocated to narrowband PCS in three one megahertz bands (901-902 MHz, 930-931 MHz and 940-941 MHz). Two megahertz of this spectrum were divided into specific channels and will be available for immediate licensing. See 47 C.F.R. § 24.129 The remaining one megahertz of narrowband PCS spectrum will be channelized and

licensed in the future as this service develops.

10. The two megahertz of narrowband PCS spectrum that is ready to be licensed has been divided into 50 kHz and 12.5 kHz channels. These channels are paired in various configurations (blocks) for individual licensing. Four different service areas have been defined: 492 Basic Trading Areas ("BTA"); 51 Major Trading Areas ("MTA"); 5 regional areas (made up of MTAs), which together comprise the nation; and a nationwide service area.[3] There are a total of 3,554 narrowband PCS licenses to be issued. These licenses are as follows:

	50/50 kHz (paired)	50/12.5 kHz (paired)	50 kHz (unpaired)	12.5 kHz (unpaired)	Total	Overall Total
Nationwide	5	3	3		11*	11*
Regional (5 Regions)	2	4			6	30
MTA (51)	2	3	2	4**	11	561
BTA (492)		2		4**	6	2,952
Total						3,554

* Only 10 of the 11 nationwide narrowband PCS licenses are available to be auctioned because one applicant, Mobile Telecommunications Inc. ("Mtel"), was awarded a pioneer's preference for one of the unpaired 50 KHz licenses. Accordingly, this license will not be subject to competing mutually exclusive applications.

** Eligibility for these licenses is restricted to incumbent paging licensees authorized under Part 22 or Part 90 of our rules as of June 24, 1993. To be eligible, the existing paging licensee must operate at least one base station in the MTA or BTA for which it is applying for a paging response channel. In addition, these channels are limited to

---

[3] BTAs and MTAs are based on the Rand McNally 1992 Commercial Atlas and Marketing Guide, 123rd Edition, at pp. 38-39. See 47 C.F.R. § 24.102. The nationwide service area includes the fifty states, the District of Columbia, American Samoa, Guam, Northern Mariana Islands, Puerto Rico, and the United States Virgin Islands. See 47 C.F.R. § 24.102 (a). Operations in markets or portions of markets which border other countries, such as Canada or Mexico will be subject to on-going coordination arrangements with the neighboring countries. See 47 C.F.R. § 24.129(e)

mobile-to-base transmissions and may be used only in a paired manner with existing paging channels to provide mobile-to-base station communications. See 47 C.F.R. §24.130.

11. Except with respect to the 12.5 kHz unpaired licenses reserved for the upgrade of existing paging systems, narrowband PCS licensees will be permitted to aggregate up to three licenses in any geographic area. Incumbent paging licensees are permitted to obtain up to two of the 12.5 kHz unpaired licenses in any geographic area. Narrowband PCS Order at ¶ 26.

B. General Competitive Bidding Rules

12. The Second Report and Order established the criteria to be used in selecting which auction design method to use for each particular auctionable service. Generally, we concluded that awarding licenses to those parties who value them most highly will foster Congress' policy objectives. In this regard, we noted that since a bidder's ability to introduce valuable new services and to deploy them quickly, intensively, and efficiently increases the value of a license to that bidder, an auction design that awards licenses to those bidders with the highest willingness to pay tends to promote the development and rapid deployment of new services and the efficient and intensive use of the spectrum. In articulating our auction design principles we further stated that: (1) licenses with strong value interdependencies should be auctioned simultaneously; (2) multiple round auctions, by providing bidders with information regarding other bidders' valuations of licenses, generally will yield higher revenues and more efficient allocations of licenses, especially where there is substantial uncertainty as to value; and (3) because they are relatively expensive to implement and time-consuming, simultaneous and/or multiple round auctions become less cost-effective as the value of licenses decreases. See Second Report and Order at ¶ 69.

13. Based on the foregoing, we concluded that where the licenses to be auctioned are interdependent and their value is expected to be high simultaneous multiple round auctions would best achieve the Commission's goals for competitive bidding. See Second Report and Order at ¶¶ 109-111. We indicated that compared with other bidding mechanisms, simultaneous multiple round bidding will generate the most information about license values during the course of the auction and provide bidders with the most flexibility to pursue back-up strategies. Thus, we concluded that simultaneous multiple round bidding was most likely to award interdependent licenses to the bidders who value them the most. We also indicated that this method will facilitate efficient aggregation of licenses across spectrum bands thereby resulting in vigorous competition among several strong service providers who will be able rapidly to introduce a wide variety of services highly valued by end users. Second Report and Order at ¶ 106. In addition, we concluded that because of the superior information and flexibility it provides, this method will be more likely than other auction designs to yield greater revenues. Thus, we found that the use of simultaneous multiple round auctions would generally be preferred. Id.

14. The other major factor leading us to select simultaneous multiple round auctions

as our preferred auction method was the value of the licenses to be auctioned. Because simultaneous multiple round bidding is more administratively complex and costly both for bidders and the FCC than other auction methods we may select, we indicated that we would only use this auction design where license values are interdependent and the expected value of the licenses to be auctioned is high relative to the costs of conducting a simultaneous multiple round auction.

15. Circumstances Leading to Choice of Other Designs. In the Second Report and Order we stated our intention to tailor the auction design to fit the characteristics of the licenses to be awarded. We noted that simultaneous multiple round auctions may not be appropriate for all licenses. Where there is less interdependence among licenses, there is also less benefit to auctioning them simultaneously. We explained that when the values of particular licenses to be auctioned are low relative to the costs of conducting a simultaneous multiple round auction, we may consider auction designs that are relatively simple, with low administrative costs and minimal costs to the auction participants. For example, with large numbers of low value licenses we noted that we may decide that it is preferable to implement a low cost auction method such as single round sealed bidding to minimize cost and expedite the licensing process. We also noted that the Commission may wish to consider a single round of bidding in certain auctions where eligibility requirements limit participation to few bidders. See Second Report and Order at ¶¶ 112-113.

C. Competitive Bidding Design for Narrowband PCS Licenses

16. In this section, we adopt simultaneous multiple round auctions as our primary auction methodology for narrowband PCS licenses. We believe that, for most narrowband licenses this method will best meet Congress' goals in enacting the competitive bidding legislation. However, because the licenses to be awarded in the narrowband PCS service vary in terms of expected value and interdependence, we have determined that no single competitive bidding design is optimal for all licenses. Moreover, Congress directed us to "design and test multiple alternative methodologies under appropriate circumstances." See Section 309(j)(3). For these reasons, we will adopt several auction designs that may be selected under appropriate circumstances to auction narrowband PCS licenses. We specify below the various competitive bidding design methods that we may select to award particular categories of narrowband PCS licenses as well as the license characteristics that will favor their use. When we announce individual auctions to award specific groups of narrowband licenses, we will issue a Public Notice detailing the competitive bidding design and procedures to be used.

17. Simultaneous Multiple Round Auctions. Commenters who specifically address narrowband PCS auctions generally favor simultaneous multiple round bidding. American Paging Inc. ("API") supports this auction design for narrowband PCS because it provides continuous information to bidders about license values. According to API, this information is crucial to small- and mid-sized firms in developing bidding strategies for interdependent licenses. API also maintains that simultaneous multiple round bidding is essential to allow

bidders to express the true value of interdependent licenses given different aggregation strategies, and will thus, ensure that licenses are awarded efficiently to the highest valued user. See ex parte filing of API (February 24, 1994). Similarly, PacTel Corporation ("PacTel") argues that simultaneous multiple round bidding is appropriate for narrowband PCS licensing because of the high value of most narrowband PCS licenses and the significant interdependence between spectrum blocks and geographic regions. See comments of PacTel at 19.

18. We agree with commenters who support simultaneous multiple round bidding for awarding most narrowband PCS licenses. Based on the record in this proceeding, as well as our analysis of the Office of Management and Budget and the Congressional Budget Office estimates of total PCS revenues,[4] we expect the value of most narrowband PCS licenses to be sufficiently high to warrant the use of simultaneous auctions. We further believe that the value of most narrowband PCS licenses will be significantly interdependent because of the desirability of aggregation across spectrum blocks and geographic regions and because there is a high degree of substitutability among licenses with the same amount of spectrum and covering the same geographic area. Therefore, we conclude that simultaneous multiple round bidding will be most likely to award narrowband PCS licenses to bidders who value them the most highly and who are most likely to deploy rapidly new narrowband PCS technologies and services, promote the development of competition for the provision of those and other services, and thus foster economic growth.

19. By facilitating efficient (but not anticompetitive) aggregation of licenses, we believe that simultaneous multiple round bidding will allow bidders to express the full value of the interdependency among licenses. Moreover, simultaneous multiple round bidding will provide bidders with the opportunity to pursue back-up strategies that enable them most efficiently to obtain the license combinations which satisfy their service needs. Finally, given that narrowband PCS is a new service with many inherent uncertainties, we conclude that simultaneous multiple round bidding is desirable because of the continuous information it provides bidders during the course of the auction which, in turn, should result in increased revenues for the government.

20. We recognize, however, that simultaneous multiple round bidding may involve a greater degree of complexity than other competitive bidding methods, and that it may present greater operational difficulties for both the FCC and for bidders. Therefore, where license values are expected to be relatively low, bidder participation is expected to be limited or where the interdependence of licenses is less significant, we may decide to use alternative auction methods. In addition, we may select an alternative auction method if, as we gain experience with auctions, we determine that simultaneous multiple round auctions are too administratively complex and costly to implement. In selecting the auction method for each

---

[4] Congressional Budget Office, *Auctioning Radio Spectrum Licenses* at 23-38, (March 1992).

narrowband PCS auction, we will seek to balance the advantages of more sophisticated auction methods, such as simultaneous multiple round bidding, with the greater complexity and cost they may entail for both the FCC and bidders.

21. Oral Sequential and Single Round (Sealed Bid) Auctions. If, as a result of our auction experience, we determine that the operational costs or complexities associated with simultaneous multiple round auctions outweigh their benefits, we may decide instead to employ either oral sequential auctions or single round sealed bid auctions. In an oral sequential auction, licenses are put up for bid one at a time, so that bidding ends on one item before it begins on the next item. Oral sequential auctions generate valuable information about earlier auctioned licenses, which can assist bidders in valuing later auctioned licenses. However, if license values are interdependent oral sequential auctions are less likely than simultaneous auctions to award interdependent licenses to the parties who value them the most and to aggregate licenses efficiently, because bidders for licenses that are auctioned early must bid with less information about the value of licenses to be auctioned later, and have less opportunity to pursue backup bidding strategies. Nonetheless, because oral sequential auctions are generally less complex, and costly both for the FCC and for potential bidders, they may be appropriate to use where the expected value of the narrowband PCS licenses to be auctioned is low relative to the costs of conducting a more complex auction or where interdependence is less significant.

22. We may find, for some narrowband PCS licenses that even the lesser cost and complexity of oral sequential auctions are not justified by the revenues these licenses would be expected to generate. In such cases, we may choose to award licenses by single round sealed bidding where bids for all licenses are submitted simultaneously and the high bidder for each license is determined after a single round of bidding. Single round sealed bidding has the principal advantage of being relatively simple for bidders to understand and inexpensive for the FCC to administer and also can generally be completed fairly rapidly. However, because single round sealed bidding provides less information and flexibility to bidders than either simultaneous or sequential auctions, we will generally use this method only where there is less interdependence among individual licenses or groups of licenses and the expected value of the licenses to be auctioned is low relative to the cost of conducting a more complex auction. In addition, we may select this auction design where eligibility requirements limit participation to relatively few bidders.

23. Combinatorial Bidding. One commenter, PageMart Inc. ("PageMart"), indicated that the Commission should employ a system of combinatorial bidding for narrowband PCS licensing. In general terms, combinatorial bidding allows bidders to bid for multiple licenses as all or nothing packages.[5] Combinatorial bidding can be implemented with either

---

[5] In combinatorial bidding, if a bid for a group of licenses exceeds the sum of the highest bids for the individual licenses that comprise the package, then the package bid would win. In the Second Report and Order we also indicated that we may institute a premium so that the

simultaneous or sequential auction designs. PageMart argues that combinatorial bidding for narrowband PCS licenses is necessary to enable bidders to assemble easily national and supra-regional service areas. Without combinatorial bidding, PageMart maintains, insufficient national and supra-regional licenses will be available, thus significantly limiting the ability of all but the largest firms to compete in these markets. See reply comments of PageMart at 16. In addition, PageMart argues that only if firms are permitted to submit combinatorial bids can they adequately express value interdependencies without corresponding distortions in bidding behavior. In this regard, PageMart suggests that in the absence of combinatorial bidding, bidders assembling service areas on an MTA-by-MTA or region-by-region basis will, in many cases, cause the licenses captured early to be undervalued and licenses won later to be overvalued. See reply comments of PageMart at 19.

24. Although we recognized in the Second Report and Order that there were significant benefits associated with combinatorial bidding, especially in terms of efficient aggregation of licenses, we concluded that simultaneous multiple round auctions offer many of these same advantages without the same degree of administrative and operational complexity and without biasing auction outcomes in favor of combination bids. See Second Report and Order at ¶¶ 101-105. Since simultaneous multiple round bidding is our preferred auction method for awarding narrowband PCS licenses, we think combinatorial bidding will be unnecessary in most narrowband PCS auctions. With respect to narrowband PCS licenses, we do not believe that the advantages of combinatorial bidding outweigh the disadvantages. While narrowband PCS licenses are likely to be worth more to some bidders as a part of a package, we believe that simultaneous multiple round bidding will provide these bidders with ample opportunity to express the value of interdependent licenses. Moreover, we conclude that there will not be any extreme discontinuity in value if some licenses in a package are not obtained. We believe that the opportunity to acquire licenses in after market transactions and the ability to withdraw bids (upon payment of the bid withdrawal penalty) will limit the risks associated with failing to successfully acquire all of the licenses in a desired package. Finally, we believe that the narrowband PCS allocation plan, which provides for 11 nationwide and 30 regional licenses, already addresses many of Pagemart's concerns regarding insufficient numbers of national and supra-regional licenses. However, in circumstances where we do not use simultaneous multiple round bidding, we may permit combinatorial bidding.

D. Bidding Procedures

25. Grouping of Licenses. Whether we use our preferred approach of a sequence of simultaneous multiple round auctions or sequential individual auctions, the Commission must choose which licenses will be auctioned together. The importance of the choice of license groupings increases with the degree of interdependence among the individual licenses or

---

combinatorial bid would win only if it exceeded the sum of the bids for individual licenses by a set amount. See Second Report and Order at ¶ 114.

groups of licenses to be auctioned. Grouping interdependent licenses together and putting them up for bid at the same time will facilitate awarding licenses to bidders who value them the most highly by providing bidders with information about the prices of complementary and substitutable licenses during the course of an auction. Accordingly, we will group narrowband PCS licenses into the various simultaneous auctions by aggregating together those licenses exhibiting the greatest degree of interdependence so that there will be limited interdependence across groups.

26. Choosing which licenses to auction simultaneously requires a judgment about the degree of interdependence, i.e., the extent to which the amount bidders are willing to pay for one license depends on the price of another. Licenses may be interdependent either because they are substitutes or because they are complements. With substitutes, the lower the price of one license, the less a bidder will be willing to pay for another. With complementary licenses, on the other hand, the lower the price of one license, the more a bidder will be willing to pay for another. This is true because generally complementary licenses are worth more as part of a package than individually. For example, bidders are likely to be willing to pay more for two geographically contiguous PCS licenses than two equivalent non-contiguous licenses, and a single bidder may be willing to pay more for the two licenses than would two separate bidders.

27. Based on the foregoing, we will auction narrowband PCS licenses in the following license groupings. We will award all nationwide, regional and MTA (other than MTA response channels) licenses through a sequential series of simultaneous auctions.[6] In this regard, to maximize the information available to bidders and increase gradually the complexity of the narrowband PCS auctions as we gain more auction experience, we will begin by auctioning the ten nationwide narrowband licenses in one simultaneous multiple round auction. After the nationwide narrowband PCS auction is complete, we will auction the five regional blocks (30 licenses) together in one simultaneous multiple round auction. We subsequently will conduct another simultaneous multiple round auction for all of the 50/50 kHz paired, 50/12.5 kHz paired and the 50 kHz unpaired MTA licenses (357 licenses).[7]

---

[6] However, as we gain auction experience we may determine that an alternative auction method or license grouping is more appropriate. Under theses circumstances, as provided in the general procedural rules, we will announce before each auction the licenses to be auctioned and the type of competitive bidding method to be used, as well as the stopping rules and activity rules, if any, that will be used.

[7] Alternatively, we may determine that, for reasons of operational or administrative simplicity, it would be preferable to auction these MTA licenses by region (there are approximately 112 MTA licenses in each region) in a series of simultaneous multiple round auctions (in which case we would also include the 12.5 kHz unpaired MTA licenses). Under these circumstances, we would auction all of the MTA licenses in a particular region before moving on to the next region.

Simultaneous multiple round auctions are appropriate for each of these license groupings because of the relatively high value and significant interdependence of the licenses. In each case, the licenses are complements as well as substitutes, and thus their values are highly interdependent. They are complements because license aggregation enables bidders to realize certain economies of scale and, in the case of sub-national licenses, facilitates seamless roaming over wide areas, as well as aiding in the control of interference at license boundaries. These licenses are also substitutes because, to varying degrees, they can be used as alternatives in the provision of the same or similar services.

28. After auctioning the MTA licenses, we will hold another simultaneous multiple round auction for the 50/12.5 kHz paired BTA licenses (984 licenses). Although most of these licenses are expected to have relatively low values, individually they are highly interdependent, and their aggregate value (compared to the cost of conducting a simultaneous auction) is sufficiently high to justify a simultaneous multiple round auction. Using this approach will also enable the Commission to gain valuable experience conducting simultaneous multiple round auctions involving large numbers of licenses.

29. Finally, we will auction the 12.5 kHz unpaired MTA (204 licenses) and the 12.5 kHz unpaired BTA response channel licenses (1,968 licenses) in a single round sealed bid auction because their value is low relative to the cost of conducting other more complex auctions. Moreover, because only incumbent paging licensees are eligible to bid on these licenses, sealed bid auctions may help to reduce the chances of collusion among the limited number of bidders. In addition, the loss in efficiency from using single round bidding will be mitigated by the fact that bidders on these licenses will have access to information about license values from the simultaneous multiple round auctions that will precede the sealed bid auction. Under this auction method, however, bidders cannot be certain that they will be the high bidder on all of the licenses they seek to obtain because single round sealed bidding does not provide bidders with timely information about license values and bidders do not have the opportunity to increase their bid amounts during the course of the auction. Therefore, in this context we will allow bidders to bid on more licenses than they are eligible to be awarded under the existing aggregation limits, provided they specify in advance the order in which they wish to be awarded such licenses in the event that they are the high bidder on more licenses then they are permitted to hold.[8] Bidders, however, will only be permitted to bid on response channel licenses for which they are otherwise eligible (i.e., they must operate at least one base station in the service area of the response channel for which they are applying).[9]

---

[8] See 47 C.F.R. § 24.130 (a) (paging licensees may hold a maximum of two response channel licenses within the same geographic area). The Commission, however, will not designate a bidder the winning bidder on more licenses than it is eligible to hold. Under these circumstances, a high bidder will not be subject to the bid withdrawal penalty (discussed infra) for those additional licenses for which it is not designated the winning bidder.

[9] Id.

30. Bid Increments. Where we use simultaneous multiple round auctions to award narrowband PCS licenses it is important to specify minimum bid increments. The bid increment is the amount or percentage by which the bid must be raised above the previous round's high bid in order to be accepted as a valid bid in the current bidding round. The application of a minimum bid increment speeds the progress of the auction and, along with activity and stopping rules, helps to ensure that the auction comes to closure within a reasonable period of time. Establishing an appropriate minimum bid increment is especially important in a simultaneous auction with a simultaneous closing rule. In that case, all markets remain open until there is no bidding on any license and a delay in closing one market will delay the closing of all markets.

31. Because we plan to use simultaneous multiple round auctions for most narrowband PCS licenses, we believe that it is necessary to impose a minimum bid increment to ensure that the narrowband PCS auctions conclude within a reasonable period of time. As we recognized in the Second Report and Order, it is important in establishing the amount of the minimum bid increment to express such increment in both a percentage and fixed dollar amount. See Second Report and Order at ¶ 126. This will ensure a timely completion of the auction even if bidding begins at a very low dollar amount. Accordingly, we may impose a minimum bid increment of 5 percent or $0.01 per pop per MHz, whichever is greater, in narrowband PCS auctions where multiple round bidding is used. Commenters addressing the issue generally supported a minimum bid increment of five percent. PacTel, for example, argues that this amount will provide a reasonable compromise between the goal of completing the auction quickly and that of revealing information about the distribution of valuations among bidders.[10] Applying a $0.01 per pop per MHz minimum bid increment in addition to the percentage calculation we believe is appropriate to provide flexibility for a wide range of different license values and will ensure timely closure of auctions, even where bidding begins at a very low dollar amount.[11]

32. PacTel also suggests, in the context of simultaneous auctions that the Commission should vary the bid increment, reducing it as the number of active bidders declines, in order to bring all markets to a close at approximately the same time. This would move the auction quickly at the beginning while still allowing smaller price movements as the auction nears a close. Such a refinement will also reduce the chances of ties by allowing bidders to express relatively small differences in license valuations.[12] Accordingly, the Commission retains the

---

[10] Exhibit attached to PacTel Comments: Auction Design for Personal Communications Services, R. Preston McAfee, p. 16.

[11] $0.01 per-pop per MHz would represent almost three percent of the value of a license based on an extrapolation from the $10.6 billion estimated value of the 120 MHz of broadband PCS spectrum. See Second Report and Order ¶ 177.

[12] Where a tie does occur, the high bidder will be determined in the order the bids were received by the Commission. See Second Report and Order at ¶ 125.

discretion in narrowband PCS auctions to set and, by announcement before or during the auction, vary the minimum bid increments for individual licenses or groups of licenses over the course of an auction. We will most likely reduce the minimum bid increment only in the later bidding rounds, as bidding begins to come to a close. [13]

33. Stopping Rules for Multiple Round Auctions. We also noted in the Second Report and Order that with multiple round auctions a stopping rule must be established for determining when the auction is over. See Second Report and Order at ¶ 127. We identified three types of stopping rules that could be employed in simultaneous multiple round auctions: markets may close individually, simultaneously or a hybrid approach may be used. Under a market-by-market approach, bidding closes on each license after one round passes in which no new acceptable bids are submitted for that particular license. With a simultaneous stopping rule, bidding remains open on all licenses until there is no bidding on any license.[14] Under this approach, all markets will close if a single round passes in which no new acceptable bids are submitted for any license. Using a hybrid approach, we may use a simultaneous stopping rule, along with an activity rule designed to bring the markets subject to the simultaneous stopping rule to a close within a reasonable period of time, for the higher value licenses. And for lower value licenses, where the loss from eliminating some back-up strategies is less, we may use simpler market-by-market closings. In the Second Report and Order we recognized that such a hybrid approach might simplify and speed up the auction process without significantly sacrificing efficiency or expected revenue. Id.

34. For narrowband PCS we believe that a simultaneous stopping rule is preferable for the nationwide, regional and MTA licenses, which are expected to have relatively high values and are fewer in number, which will reduce the complexity of implementing a simultaneous stopping rule. Since we intend to impose an activity rule (as discussed below at ¶ 37-41), we believe that allowing simultaneous closing of all markets will afford bidders flexibility to pursue back up strategies without running the risk that bidders will hold back their bidding until the final rounds. However, because of the large number of BTA licenses and their relatively low expected value, we may use either a hybrid stopping rule or allow markets to close individually in auctions for these licenses.[15]

---

[13] In oral sequential auctions the auctioneer may within its sole discretion establish and vary the amount of the minimum bid increment in each round of bidding.

[14] This approach has the advantage of providing bidders full flexibility to bid for any license as more information becomes available during the course of the auction, but it may lead to very long auctions, unless an activity rule is imposed. Furthermore, such a stopping rule may be vulnerable to strategic delay by bidders seeking to impede closure of the auction.

[15] However, if as we gain experience with auctions, we determine that a simultaneous stopping rule will be simpler to administer than either a hybrid or a market-by-market stopping rule, we may use a simultaneous stopping rule for the BTA licenses as well. Conversely, if as a result of our auction experience we conclude that a simultaneous stopping

35. In addition, we will retain the discretion to declare at any point in a simultaneous multiple round auction that the auction will end after one additional round (or some other specified number of additional rounds). This will prevent bidders from strategically delaying an auction by bidding on one license in order to delay the closing of bidding on all licenses. This will also ensure ultimate Commission control over the duration of the auction. Moreover, while we generally will provide bidders with a single business day to submit bids, and conduct one round of bidding each business day, we reserve the discretion to vary the duration of bidding rounds or the interval at which bids are accepted (e.g., run two or more rounds per day rather than one), in order to move the auction toward closure more quickly. We will be most likely to shorten the duration and/or intervals between bidding rounds where there are relatively few licenses to be auctioned, where the value of the licenses is relatively low or in early rounds to speed the auction process. Where license values are expected to be high or where large numbers of licenses are being auctioned we may increase the duration and/or intervals between bidding rounds. We will announce by Public Notice, and may vary by announcement during an auction, the duration and intervals between bidding rounds.

36. Activity Rules. As discussed above, in order to ensure that simultaneous auctions with simultaneous stopping rules close within a reasonable period of time, we believe that it is necessary to impose an activity rule to prevent bidders from waiting until the end of the auction before participating. Because simultaneous stopping rules generally keep all markets open as long as anyone wishes to bid, they also create an incentive for bidders to hold back until prices approach equilibrium before making a bid and risking paying a penalty for withdrawing. As noted above, this could lead to very long auctions. An activity rule is less important when markets close one-by-one because failure to participate in any given round may result in losing the opportunity to bid at all, if that round turns out to be the last.

37. In the Second Report and Order we adopted the Milgrom-Wilson activity rule as our preferred activity rule where a simultaneous stopping rule is used. See Second Report and Order at ¶¶ 144-145. Under the Milgrom-Wilson approach, bidders are encouraged to participate in early rounds by limiting their maximum participation to some multiple of their minimum participation level. Bidders are required to declare their maximum eligibility in terms of pops-MHz, and make an upfront payment equal to $0.02 per MHz-pop. (See discussion of upfront payments infra.) That is, bidders will be limited to bidding on licenses encompassing no more than the number of MHz-pops covered by their upfront payment. Under this approach, bidders will have the flexibility to shift their bids among any licenses for which they have applied so long as the total MHz-pops encompassed by those licenses does not exceed the number for which they made an upfront payment. Moreover, bidders will be able to secure the freedom to participate at whatever level they deem appropriate by making a sufficient upfront payment. To preserve their maximum eligibility, however, bidders would

---

rule is too administratively complex, we may employ a market-by-market or hybrid stopping rule for the higher value narrowband licenses. We will announce by Public Notice before each auction the stopping rule that we will use.

be required to maintain some minimum activity level during each round of the auction.

38. Under the Milgrom-Wilson proposal, the minimum activity level, measured as a fraction of the self declared maximum eligibility, will increase during the course of the auction. Milgrom and Wilson divide the auction into three stages.[16] During the first stage of the auction, a bidder is required to be active on licenses encompassing one-third of the MHz-pops for which it is eligible. The penalty for falling below that activity level is a reduction in eligibility. At this stage, bidders would lose three MHz-pops in maximum eligibility for each MHz-pop below the minimum required activity level. In other words, each bidder would retain eligibility for three times the MHz-pops for which it is an active bidder, up to the MHz-pops covered by the bidder's upfront payment. In the second stage, bidders are required to be active on two-thirds of the MHz-pops for which they are eligible. The penalty for falling below that activity level would be a loss of 1.5 MHz-pops in eligibility for each MHz-pop below the minimum required activity level. In the third stage, bidders are required to be active on licenses encompassing all of the MHz-pops for which they are eligible. The penalty for falling below that activity level is a loss of one MHz-pop in eligibility for each MHz-pop below the minimum required activity level. Each bidder thus retains eligibility equal to its current activity level (1 times the MHz-pops for which it is an active bidder).

39. Finally, to avoid the consequences of clerical errors and to compensate for unusual circumstances that might delay a bidder's bid preparation or submission on a particular day, Milgrom and Wilson recommend permitting each bidder to request and automatically receive a waiver of the activity rule once every three rounds. We believe that some waiver procedure is a critical element of the Milgrom-Wilson activity rule, since the Commission would not wish to reduce a bidder's eligibility due to an accidental act or circumstances not under the bidder's control.

40. We believe that the Milgrom-Wilson approach will best achieve the Commission's goals of affording bidders flexibility to pursue back up strategies, while at the same time ensuring that simultaneous auctions are concluded within a reasonable period of time. Accordingly, we plan to impose such an activity rule in conjunction with a simultaneous stopping rule to award higher value narrowband PCS licenses. We intend, however, to use a simplified waiver procedure whereby bidders will be permitted five automatic waivers from the activity rule during the course of an auction. With respect to the 50/12.5 kHz paired BTA licenses to be awarded by simultaneous auction, we may determine that because of their lower expected value a market-by-market stopping rule is more appropriate, in which case no activity rule will be necessary. However, if a simultaneous stopping rule is used for these licenses we may select one of the simpler activity rules described in the Second Report and

---

[16] The auction will move from stage one to stage two when, after three rounds of bidding, the high bid has changed on five percent or fewer of the licenses (measured in terms of MHz-pops) being auctioned. Stage three will begin when the high bid has changed on two percent or fewer licenses (measured in terms of MHz-pops) over three rounds.

Order.[17] Moreover, if as we gain experience with auctions, we determine that the Milgrom-Wilson activity rule is too complicated or costly to administer, we may alternatively impose one of these less complex activity rules in auctions for larger narrowband PCS licenses as well. We will announce by Public Notice before each auction the activity rule that will be employed in that particular auction.

IV. PROCEDURAL, PAYMENT AND PENALTY ISSUES

A. Pre-Auction Application Procedures

41. In the Second Report and Order the Commission established general competitive bidding rules and procedures which we noted may be modified on a service-specific basis. As discussed below, we will follow the procedural, payment and penalty rules established in the Second Report and Order with certain minor modifications designed to address the characteristics of the narrowband PCS service. These rules are structured to ensure that bidders and licensees are qualified and will be able to construct systems quickly and offer service to the public. By ensuring that bidders and license winners are serious, qualified applicants, these rules will minimize the need to re-auction licenses and prevent delays in the provision of narrowband PCS service to the public. In addition, as we proposed Notice, we adopt general procedural and processing rules based on the Part 22 of the Commission's rules.[18]

---

[17] Our rules allow the Commission to make any such modifications to activity rules as appropriate for a particular auction. The Commission retains the discretion to choose among the following other activity rules, which are described more fully in the Second Report, on a case-by-case basis: (1) a Milgrom-Wilson rule with one or two stages rather than three, (2) a requirement that bidders be active on a single license in each round, (3) a rule that a bidder's activity level remain within a single range throughout the auction (i.e., remain active on some percentage of the total pops-MHz covered by the upfront payment), (4) a rule that replaces the maximum allowed bidding levels in the Milgrom-Wilson rule with a bidding premium for exceeding those maximums, or (5) a combination of the foregoing rules. See Second Report and Order at ¶ 141.

[18] Notice at ¶ 129. We have modified Part 22 as necessary to reflect the somewhat different way in which narrowband PCS is licensed. Our Part 22 rules, for example, contemplate the filing of a separate application for each base station. Under Part 24, however, licensees receive a market-wide license. Applications for individual sites will not be accepted. Thus, we have modified the Part 22 rules for clearing individual antenna sites and based the antenna clearance process on Section 97.15 of our rules (47 C.F.R. § 97.15). Similarly, we have decided that narrowband PCS licensees should maintain a list of all current base station locations in lieu of filing a separate application for each base station.

42. Before each scheduled narrowband PCS auction the Commission, or pursuant to delegated authority, a Bureau, will release an initial Public Notice announcing the auction. This initial Public Notice will specify the license(s) to be auctioned and the time, place and method of competitive bidding to be used, including applicable bid submission procedures, bid withdrawal procedures and penalties, stopping rules and activity rules and other important information. The initial Public Notice will also specify the filing deadline for short-form applications.

43. All bidders will be required to submit short-form applications on FCC form 175 by the date specified in the initial Public Notice.[19] If the Commission receives only one application that is acceptable for filing for a particular license, and thus there is no mutual exclusivity, the Commission will by Public Notice cancel the auction for this license and establish a date for the filing of a long-form application, the acceptance of which will trigger the procedures permitting petitions to deny. In order to encourage maximum bidder participation, we will provide applicants with an opportunity to correct minor defects in their short-form applications prior to the auction. However, applicants will not be permitted to make any major modifications to their applications, including ownership changes or changes in the identification of parties to bidding consortia. In addition, applications that are not signed will be dismissed as unacceptable.

44. The Commission will issue a second Public Notice listing all defective applications and applicants with minor defects will be given an opportunity to cure and resubmit defective applications.[20] After reviewing the corrected applications, the Commission will release a third Public Notice announcing the names of all applicants whose applications have been accepted for filing. Applicants identified in the third Public Notice will then be required to submit the full amount of their upfront payment (defined below in ¶ 45) to the Commission's lock-box bank by the date specified in the Public Notice, which generally will be no later than 14 days before the scheduled auction. After the Commission receives from its lock-box bank the names of all applicants who have submitted timely upfront payments,

---

[19] Since Section 8 of the Communications Act, 47 U.S.C. § 158, does not currently afford the Commission authority to charge a fee in connection with PCS applications, narrowband PCS applicants will not be required to submit a fee with their short-form application. However, the Commission has requested that Congress amend Section 8 of the Communications Act to provide a specific fee for PCS services. If the Commission receives fee authority, the general rules governing submission of fees will apply. See 47 C.F.R. § 1.1101 et seq. These rules currently provide for dismissal of an application if the application fee is not paid, is insufficient, is in improper form, is returned for insufficient funds or is otherwise not in compliance with our fee rules.

[20] On the date set for submission of corrected applications, applicants that on their own discover minor errors in their applications (e.g., typographical errors, incorrect license designations, etc.) also will be permitted to file corrected applications.

the Commission will issue a fourth Public Notice announcing the names of all applicants that have been determined to be qualified to bid.[21] Each applicant listed on this fourth Public Notice will be issued a bidder identification number and further information and instructions regarding the auction procedures.

B. Upfront Payment

45. We will require all auction participants to tender in advance to the Commission a substantial upfront payment as a condition of bidding in order to ensure that only serious, qualified bidders participate in auctions and to ensure payment of the penalty (discussed infra) in the event of bid withdrawal or default. We believe that the standard upfront payment formula of $0.02 per pop per MHz for the largest combination of MHz-pops a bidder anticipates bidding on in any single round of bidding is appropriate for narrowband PCS services.[22] Although some commenters suggested a higher pop-MHz upfront payment calculation for narrowband PCS auctions,[23] we believe that our standard $0.02 per pop per MHz upfront payment formula is appropriate to attract as many qualified bidders as possible while providing adequate deterrence against frivolous bidding. This upfront payment calculation will define the upper bound of MHz-pops on which a bidder will be permitted to bid in any round, and so should be calculated by bidders to reflect the maximum MHz-pops from any combination of licenses on which they may want to bid in a single round. Using this formula will provide bidders with the flexibility to change their strategy during an auction and to bid on a larger number of smaller licenses or a smaller number of larger licenses, so long as the total MHz-pops combination does not exceed that amount covered by the upfront payment. If licenses covering the nation are being auctioned simultaneously, a bidder will not be required to file an upfront payment representing national coverage unless it intends to bid on licenses covering the entire nation in any single bidding round. We will announce the upfront payment amount for each license in a Public Notice issued prior to the auction.

46. In the Second Report we established a minimum upfront payment of $2,500 to ensure that the use of our preferred formula would result in a substantial enough payment that bidders would be deterred from making frivolous bids. We indicated, however, that this amount could be modified on a service specific basis. We believe that a $2,500 minimum may be too high for some narrowband licenses in sparsely populated areas, which may be have values below this amount. We, therefore, will establish a lower minimum upfront

---

[21] An applicant who fails to submit a sufficient upfront payment to qualify it to bid on any license being auctioned will not be identified on this Public Notice as a qualified bidder.

[22] As discussed infra, however, we retain the flexibility to consider using a simpler payment requirement if circumstances warrant. The upfront payment amount will be announced by Public Notice before each auction.

[23] PacTel Paging proposed a $0.04 per pop per MHz formula for MTA licenses and a $0.08 per pop per MHz formula for BTA licenses. PacTel Paging Reply Comments at ¶ 11.

payment of $1,000 for narrowband PCS applications.

47. Upfront payments generally will be due no later than 14 days before a scheduled auction. This period should be sufficient to allow the Commission sufficient time to process upfront payment data and release a Public Notice listing all qualified bidders. The specific procedures to be followed in the tendering and processing of upfront payments are set forth in Section 1.2106 of the Commission's rules.

C. Down Payment and Full Payment for Licenses Awarded by Competitive Bidding

48. The Second Report and Order established a 20 percent down payment to discourage default between the auction and licensing and ensure payment of the penalty (discussed infra at ¶ 49) if such default occurs. We concluded that a 20 percent down payment was appropriate to ensure that auction winners have the necessary financial capabilities to complete payment for the license and to pay for the costs of constructing a system, while at the same time not being so onerous as to hinder growth and diminish access. We therefore will require that winning bidders supplement their upfront payments with a down payment sufficient to bring their total deposits up to 20 percent of their winning bid(s).[24] The winning bidder will be required to submit the required down payment by cashier's check or wire transfer to our lock-box bank by a specified date, generally within five (5) business days following the close of bidding.[25] All auction winners, with the exception of certain designated entities, will be required to make full payment of the balance of their winning bids within five (5) business days following award of the license. Grant of the license will be conditioned on this payment.

D. Bid Withdrawal, Default and Disqualification

49. In either a sequential or simultaneous auction, it is critically important that potential bidders understand that there will be a substantial penalty assessed if they withdraw a high bid, are found not to be qualified to hold licenses or are unable to pay a balance due. Any bidder who withdraws a high bid during an auction before the Commission declares

---

[24] If the upfront payment already tendered by a winning bidder, after applying any bid withdrawal penalties, amounts to 20 percent or more of its winning bids, no additional deposit will be required. If the upfront payment amount on deposit is greater than 20 percent of the winning bid amount, than the additional monies will be refunded.

[25] As discussed infra, an auction winner that is a designated entity entitled to make payments through an installment plan will be required to bring its deposits with the Commission up to only 10 percent of its winning bid after the bidding closes. Such an entity will pay an additional 10 percent of its winning bid to the Commission upon grant of the license.

bidding closed, or defaults by failing to remit the required down payment within the prescribed time, will be required to reimburse the Commission in the amount of the difference between its high bid and the amount of the winning bid the next time the license is offered by the Commission, if the subsequent winning bid is lower.[26] After bidding closes, a defaulting auction winner will be assessed an additional penalty of three percent of the subsequent winning bid or three percent of the amount of the defaulting bid, whichever is less. See 47 C.F.R.§§ 1.2104 (g) and 1.2109.[27] The additional three percent penalty is designed to encourage bidders desiring to withdraw their bids, to do so before bidding ceases. This additional penalty will also apply if an auction winner is disqualified or fails to remit the balance of its winning bid after having made the required down payment. We will hold deposits made by defaulting or disqualified auction winners until full payment of the penalty.[28] We believe that these penalties will adequately discourage default and ensure that bidders have adequate financing and that they meet all eligibility and qualification requirements. In addition, if a default or disqualification involves gross misconduct, misrepresentation or bad faith by an applicant, the Commission also may declare the applicant and its principals ineligible to bid in future auctions, and may take any other action that it deems necessary, including institution of proceedings to revoke any existing licenses held by the applicant.[29]

50. In the event that an auction winner defaults or is otherwise disqualified after an auction is closed, an issue arises as to whether the Commission should hold a new auction or simply offer the license to the second-highest bidder. Parties commenting on this issue generally favored re-auctioning the license, pointing out that changing market and even technological developments since the initial auction may change the identity of the high

---

[26] In the unlikely event that there is more than one bid withdrawal on the same license, we will hold each withdrawing bidder responsible only for the difference between its withdrawn bid and the amount of the winning bid the next time the license is offered by the Commission. This procedure ensures that each bidder who withdraws is responsible for its bid.

[27] If a license is re-offered by auction, the "winning bid" refers to the high bid in the auction in which the license is re-offered. If a license which is the subject of withdrawal or default is instead offered to the highest losing bidders in the initial auction, the "winning bid" refers to the bid of the highest bidder who accepts the offer. Losing bidders would not be required to accept the offer, i.e., they may decline without penalty. We wish to encourage losing bidders in simultaneous multiple round auctions to bid on other licenses, and therefore will not hold them to their losing bids on a license for which a bidder has withdrawn a bid or on which a bidder has defaulted.

[28] In rare cases in which it would be inequitable to retain a down payment, we will entertain requests for waiver of this provision.

[29] See Second Report and Order at ¶ 198.

bidder and the value of the license, especially if the intervening period is relatively long. See, e.g., comments of BellSouth at 37. They urge that any re-auction be open to new bidders, arguing that such a procedure would reduce the incentive of losing bidders to "gang up" on the auction winner. See comments of Utilities Telecommunications Council at 21.

51. As we stated in the Second Report and Order, we believe that, as a general rule, when an auction winner defaults or is otherwise disqualified after having made the required down payment, the best course of action is to re-auction the license either to existing or new applicants. Although we recognize that this may cause a brief delay in the initiation of service to the public, during the time between the original auction and the disqualification circumstances may have changed so significantly as to alter the value of the license to auction participants as well as to parties who did not participate. In this situation, awarding licenses to the parties that value them most highly can best be assured though a re-auction. However, if the default occurs within five (5) businesses days after bidding has closed, the Commission retains the discretion to offer the license to the second highest bidder at its final bid level, or if that bidder declines the offer, to offer the license to other bidders (in descending order of their bid amounts) at their final bid levels.[30]

52. If a new auction becomes necessary because of default or disqualification more than five (5) business days after bidding has ended the Commission will afford new parties an opportunity to file applications because so much time is likely to have passed that different parties may be interested in bidding and existing applicants may have different valuations of the license. One of our primary goals in conducting auctions is to assure that all serious interested bidders are in the pool of qualified bidders at any re-auction. We believe that achievement of this goal outweighs the short delay that we recognize may result from allowing new applications in a re-auction. Indeed, if we were not to allow new applicants in a re-auction, interested parties may be forced into an after-market transaction to obtain the license, which would itself delay service to the public and deny recovery by the government of a reasonable portion of the value of the spectrum.

53. If the winning bidder makes the down payment in a timely manner, a long-form application filed on FCC Form 401(as modified) will be required to be filed by a specified date, generally within ten (10) business days after the close of the auction.[31] After the

---

[30] If only a small number of relatively low value licenses are to be re-auctioned, the Commission may choose to offer the license to the highest losing bidders since the cost of running an auction may not exceed the benefits.

[31] Schedule B to FCC form 401 will not be required to be submitted by narrowband PCS applicants. However, applicants for narrowband PCS licenses proposing to use any portion of narrowband PCS spectrum to offer service on a private mobile radio service basis must overcome the presumption that PCS is a commercial mobile radio service. Regulatory Treatment of Mobile Services, Second Report and Order in GN Docket No. 93-252, 9 FCC

Commission receives the winning bidder's down payment and the long-form application, we will review the long-form application to determine if it is acceptable for filing. Upon acceptance for filing of the long-form application, the Commission will release a Public Notice announcing this fact, triggering the filing window for petitions to deny. If the Commission denies all petitions to deny, and is otherwise satisfied that the applicant is qualified, the license(s) will be granted to the auction winner.

54. In the Notice, we proposed to adopt general processing and procedural rules for narrowband PCS based on Part 22 of the Commission's rules.[32] One commenter, AIDE, argues that the Commission's reference to proposed PCS rules are vague and legally insufficient for a Notice of proposed rulemaking. Comments of AIDE at 16-17. AIDE also asserts that the adoption of PCS processing and procedural rules are beyond the scope of the Notice in this rulemaking proceeding. Id. We disagree. The Notice sought comment on specific rule sections contained in Part 22 of our rules and asked commenters to indicate what modifications should be made to those rules to adapt them for PCS services. See Notice at ¶ 128. In addition, the Notice specifically requested comment on the general procedural, processing and petition to deny procedures that should be used for auctionable services. The Notice's proposal to adopt processing rules based on Part 22 of the Commission's rules, with any appropriate modifications for PCS services, clearly indicated to commenters the terms of the proposed rules, as is required by 47 C.F.R. § 1.413 (c). Accordingly, we believe that the Notice's description of the proposed rules was sufficiently specific to alert bidders to the substance of our proposal and to provide an adequate opportunity for comment on those proposals. Moreover, we conclude that these issues are well within the scope of, and in fact are essential, to implement competitive bidding for narrowband PCS licenses.

55. As we proposed, we adopt a modified version of the application processing rules contained in Part 22 of the Commission's rules for narrowband PCS. These rules will govern application filing and content requirements, waiver procedures, procedures for return of defective applications, regulations regarding modification of applications, and general application processing rules. We also adopt petition to deny procedures based on Section 22.30 of the Commission's rules. In addition, as we proposed in the Notice we adopt rules similar to Section 22.943 of our existing rules (47 C.F.R. § 22.943) to prevent the filing of speculative applications and pleadings designed to extract money from sincere narrowband

---

Rcd 1411, 1460-63 (1994); 47 C.F.R. Sec. 20.9(a)(11), (b). Applicants (or licensees) seeking to dedicate a portion of the spectrum for private mobile radio service, will be required to attach as an exhibit to the Form 401 application a certification that it will offer PCS service on a private mobile radio basis. The certification must include a description of the proposed service sufficient to demonstrate that it is not within the definition of commercial mobile radio service in Section 20.3 of the Commission's rules. Id.

[32] Procedural and processing Rules for broadband PCS will be established in a separate Report and Order.

PCS applicants. In this regard, we limit the consideration that an applicant or petitioner is permitted to receive for agreeing to withdraw a petition to deny or an application to the legitimate and prudent expenses of the withdrawing applicant or petitioner. These rules are set forth in the attached Appendix.[33]

56. With regard to petitions to deny, we adopt expedited procedures consistent with the provisions of Section 309 (i) (2) of the Communications Act to resolve substantial and material issues of fact concerning qualifications.[34] This provision requires us to entertain petitions to deny the application of the auction winner if petitions to deny are otherwise provided for under the Communications Act or our Rules.[35]

57. As we indicated in the Second Report and Order, we conclude that the Commission need not conduct a hearing before denial if it determines that an applicant is not qualified and no substantial issue of fact exists concerning that determination. In the event that the Commission identifies substantial and material issues of fact in need of resolution, Section 309(i)(2) of the Communications Act permits in any hearing the submission of all or part of evidence in written form and allows employees other than administrative law judges to preside over the taking of written evidence. We will incorporate these principles into our narrowband PCS procedural rules.

E. Procedures in Other Auction Designs.

58. Single Round Bidding. Where we use sealed bidding, in addition to the information specified above, the initial Public Notice will specify the date on which sealed bids must be submitted. In single round sealed bid auctions, we will not require bidders to submit upfront payments because we believe that there is less risk of frivolous bidding when this auction design is used. We may, however, announce by Public Notice that bidders must tender the 20 percent down payment at the time they submit their bids in order to ensure payment of the penalty in case of bid withdrawal or default. In single round sealed bid auctions, we will require that bids be received on a date specified in the Public Notice and that bids clearly indicate the bidder's identification number and the auction and license to which the bid relates. Bidders submitting bids for more licenses than they are permitted to hold must also specify the order in which they wish to be awarded such licenses if they are

---

[33] These interim procedural rules may be modified by the Commission in a separate rulemaking proceeding.

[34] 47 U.S.C § 309(j)(5) forbids the granting of licenses as a result of competitive bidding unless the Commission determines that the applicant is qualified.

[35] We sought comment on a proposal to utilize existing petition to deny procedures for auctionable services (such as certain private radio services) that do not now have petition to deny procedures. See NPRM at ¶ 110.

the high bidder on more licenses then they are eligible to hold. After bids are submitted and evaluated, the Commission will issue a second Public Notice indicating all bidders who have made timely bid submissions. After release of the second Public Notice, the Commission will issue a third Public Notice announcing the high bidders on each license.[36] If the 20 percent deposit has not already been submitted, then the high bidder will be required to submit the 20 percent down payment within five (5) business days after release of the Public Notice announcing the high bidders (if the 20 percent down payment has already been submitted, the Commission will simply deposit the high bidder's down payment).

59. In the case of single round bidding, the withdrawal and default penalties must be modified to reflect the fact that bids cannot be withdrawn during the course of an auction because there is only a single round of bidding. In this context, if a bid is withdrawn before the Commission releases the Public Notice announcing the high bidders, no harm is likely to occur and no penalty will be assessed because the Commission can easily designate in the Public Notice that the party with the next highest bid is the winning bidder. If, however, a high bidder in a single round auction defaults after release of the Public Notice announcing the high bidders, the licensing process is likely to be delayed. Therefore, in order to encourage bidders in single round auctions to avoid default and the associated delays, we will impose a default penalty if a high bidder withdraws, defaults or is otherwise disqualified after release of the Public Notice announcing the winning bidders. This penalty will be equal to the difference between the high bid amount and the amount of the next highest valid bid. A bid will be considered valid for this purpose if the bidder has not already been designated the winning bidder on more licenses than it is permitted to be awarded.[37] Losing bidders, may decline a defaulted license without penalty if such default occurs more than 30 days after the Commission releases the initial Public Notice announcing the winning bidders. This should afford the Commission sufficient time to identify a new winning bidder and collect its down payment in cases where the original winning bidder defaults or is disqualified. This also allows losing bidders to respond to changed circumstances after a reasonable period of time . Where a bidder defaults or is disqualified more than 30 days after the release of the initial Public Notice announcing the winning bidders the Commission retains the discretion to either offer the license to the bidder with the next highest valid bid at its original bid price or re-auction the license. If the Commission re-auctions the license, new applications will be accepted and the additional three percent penalty (discussed supra) will apply.

---

[36] If a tie occurs, bidders will be afforded the opportunity to submit another bid and the highest bidder in this round will be designated the winning bidder.

[37] Thus, bidders will be held to their bids on the maximum number of licenses they are permitted to hold. If there are multiple defaults each bidder will be responsible for the difference between its bid and the amount of the next highest valid bid. Holding each bidder in a single round auction responsible for the difference between its bid and the next highest valid bid will discourage cascading defaults, without penalizing bidders for bidding on more licenses than they are permitted to hold.

60. Oral Sequential Auctions. Where oral sequential bidding is employed, the general procedures described above will be followed with one exception. Qualified bidders will be required to bring a cashier's check for the full amount of their upfront payment to the auction site. Bidders will be required to display their upfront payment check as a condition of being issued a bidder identification number and admittance to the bidder section of the auction site. After bidding closes on a particular license, the high bidder will be asked to tender its upfront payment and sign a bid confirmation form. If the high bidder declines to tender the upfront payment and/or refuses to sign the bid confirmation form, no penalty will be assessed because the license would be immediately re-auctioned. The only damage from such withdrawal would be delay. And in an oral sequential auction such delay may be minimal. The standard default penalty and the additional three percent penalty (described supra at ¶ 49) will be assessed, however, if the bidder defaults on the 20 percent down payment, fails to pay for the license or is disqualified after the close of an auction.

V. REGULATORY SAFEGUARDS

A. Unjust Enrichment Provisions

61. The Budget Act directs the Commission to "require such transfer disclosures and anti-trafficking restrictions and payment schedules as may be necessary to prevent unjust enrichment as a result of the methods employed to issue licenses and permits." 47 U.S.C. § 309(j)(4)(E). In the Second Report and Order, the Commission adopted safeguards designed to ensure that the requirements of Section 309(j)(4)(E) are satisfied.

62. In this Order we adopt specific rules governing unjust enrichment by designated entities, which are discussed below in Section VI. In addition, the transfer disclosure requirements contained in Section 1.2111 (a) of our rules will apply to all narrowband PCS licenses obtained through the competitive bidding process. Generally, applicants transferring their licenses within three years after the initial license grant will be required to file, together with their transfer application, the associated contracts for sale, option agreements, management agreements, and all other documents disclosing the total consideration received in return for the transfer of its license. As we indicated in the Second Report and Order we will give particular scrutiny to auction winners who have not yet begun commercial service and who seek approval for a transfer of control or assignment of their licenses after the initial license grant, in order to determine if any unforeseen problems relating to unjust enrichment have arisen outside the designated entity context. In addition, this reporting requirement will provide the Commission with valuable information that will enable us to evaluate how well the various auction methods have achieved our objectives.

B. Performance Requirements

63. The Budget Act required the Commission to "include performance requirements, such as appropriate deadlines and penalties for performance failures, to ensure prompt

delivery of service to rural areas, to prevent stockpiling or warehousing of spectrum by licensees or permittees, and to promote investment in and rapid deployment of new technologies and services."[38] In the Second Report and Order we decided that it was unnecessary and undesirable to impose additional performance requirements, beyond those already provided in the service rules, for all auctionable services. The narrowband PCS service rules already contain specific performance requirements, such as the requirement to construct within a specified period of time. See, e.g., 47 C.F.R. § 24.103 Failure to satisfy these construction requirements will result in forfeiture of the license. Accordingly, we do not adopt any additional performance requirements in this order.

C. Rules Prohibiting Collusion

64. In the Second Report and Order we adopted special rules prohibiting collusive conduct in the context of competitive bidding. See 47 C.F.R. § 1.2105 (c) We indicated that such rules would serve the objectives of the Budget Act by preventing parties, especially the largest firms, from agreeing in advance to bidding strategies that divide the market according to their strategic interests and disadvantage other bidders. These rules are applicable to all auctionable services including narrowband PCS. Generally, bidders will be required to identify on their Form 175 applications all parties with whom they have entered into any consortium arrangements, joint ventures, partnerships or other agreements or understandings which relate to the competitive bidding process. Bidders will also be required to certify that they have not entered into any explicit or implicit agreements, arrangements or understandings with any parties, other than those identified, regarding the amount of their bid, bidding strategies or the particular properties on which they will or will not bid. After the short-form applications are filed and prior to the time that the winning bidder has made its required down payment, all bidders will be prohibited from cooperating, collaborating, discussing or disclosing in any manner the substance of their bids or bidding strategies with other bidders, unless such bidders are members of a bidding consortium or other joint bidding arrangement identified on the bidder's short-form application.

65. Winning bidders are required to attach as an exhibit to the Form 401 application a detailed explanation of the terms and conditions and parties involved in any bidding consortia, joint venture, partnership or other agreement or arrangement they had entered into relating to the competitive bidding process prior to the close of bidding. All such arrangements must have been entered into prior to the filing of short-form applications. Where specific instances of collusion in the competitive bidding process are alleged during the petition to deny process, the Commission may conduct an investigation or refer such complaints to the United States Department of Justice for investigation. Bidders who are found to have violated the antitrust laws or the Commission's rules in connection with participation in the auction process may be subject to forfeiture of their down payment or their full bid amount, revocation of their license(s), and may be prohibited from participating in future auctions.

---

[38] See Section 309(j)(4)(B) of the Communications Act, as amended.

VI. DESIGNATED ENTITY PREFERENCES

A. Introduction

66. As discussed in the Second Report and Order, Congress mandated that the Commission "ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services." 47 U.S.C. § 309(j)(4)(D). The statute requires the FCC to "consider the use of tax certificates, bidding preferences, and other procedures" in order to achieve this congressional goal. In addition, Section 309(j)(3)(B) provides that in establishing eligibility criteria and bidding methodologies the Commission shall promote "economic opportunity and competition . . . by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women." 47 U.S.C. § 309(j)(3)(B). Finally, Section 309(j)(4)(A) provides that to promote these objectives the Commission shall consider alternative payment schedules including lump sums or guaranteed installment payments.

67. In the Second Report and Order we established the eligibility criteria and general rules that would govern the award of preferences for designated entities. We also established a menu of preferences, including installment payments, set-asides and bidding preferences that we could choose from in selecting the preferences that will be applicable to a particular service, and specified the circumstances under which a tax certificate program would be established. In addition, we set forth rules to prevent unjust enrichment by designated entities seeking to transfer licenses obtained through use of one of the preferences.

68. In this Report and Order we adopt specific preferences for narrowband PCS designed to ensure that designated entities are given the opportunity to participate both in the competitive bidding process and in the provision of narrowband PCS services. In particular, we adopt the following preferences:

(1) Businesses owned by women and minorities will be entitled to a 25 percent bidding credit applicable to three specified nationwide licenses (one 50/50 kHz paired, one 50/12.5 kHz paired, and one 50 kHz unpaired); ten specified regional licenses (one 50/50 kHz paired and one 50/12.5 kHz paired license in each region); and 153 specified MTA licenses (one 50/50 kHz paired, one 50/12.5 kHz paired, and one 50 kHz unpaired license in each MTA).

(2) Tax certificates will be issued to initial investors in minority and female-owned enterprises upon divestiture of their interests, and to licensees who transfer their authorizations to minority and female-owned businesses.

(3) Installment payments will be made available to small businesses for any of the BTA, MTA or regional narrowband licenses.

We also incorporate and adopt the unjust enrichment provisions adopted in the Second Report and Order applicable to installment payments and bidding credits, and we adopt unjust enrichment provisions for parties receiving licenses as a result of our tax certificate policy. Small businesses and businesses owned by women and minorities will also be defined according to the definitions and eligibility criteria established in the Second Report and Order.[39]

69. We believe that narrowband PCS will provide significant opportunities for all designated entities. Narrowband PCS will likely include a wide variety of services, including advanced paging, messaging, and advanced cordless telephones, which will have the capability to offer voice, facsimile, graphic and other imaging services. This should afford licensees flexibility to offer an array of innovative service offerings, particularly to smaller niche markets, thereby enhancing both customer choice and fostering competitive markets for products and services. Narrowband PCS also involves relatively low capital entry requirements, and is therefore well-suited to small entities, which lack access to large amounts of capital.[40]

70. We also find that the preferences we have selected for auctions in this service will fulfill the congressional directive that we provide meaningful opportunities for small businesses and businesses owned by minorities and/or women to participate in the provision of

---

[39] See 47 C.F.R. § 1.2110. This section requires that for applicants that are limited partnerships, the general partner must be a minority and/or woman (or an entity 100 percent owned and controlled by minorities and/or women) who is a U.S. citizen and owns at least 50.1 percent of the partnership equity. We clarify that in the context of limited partnerships, we will regard a woman or minority general partner as having a 50.1 percent equity stake if it shares pro rata in 50.1 percent of the partnership's profits and losses or contributes at least 50.1 percent of the partnership's capital contribution..

[40] Although the record contains no direct evidence of the costs to build out narrowband PCS systems, we have estimated these costs based on the typical construction costs of existing paging systems. Accordingly, we estimate that the cost to construct a narrowband BTA facility would be approximately $50,000. The cost to construct a narrowband MTA facility, in accordance with the five-year build-out requirements, would be approximately $100,000 to meet the minimum population coverage requirements, and approximately $1.25 million (assuming 25 base stations) to meet the minimum geographic coverage requirements. Constructing a regional narrowband facility would cost approximately $1 million to cover the necessary population and $2.5 million to cover the minimum geographic area. Finally, we estimate that the build- out cost for a nationwide facility would be approximately $1.7 million for population coverage and $12.5 million for geographic area coverage.

narrowband PCS services. As explained below, we have selected preferences that are tailored to the unique characteristics of narrowband PCS and that should create meaningful incentives for small businesses and businesses owned by minorities and/or women to both bid successfully for available licenses and provide innovative and expeditious service to the public. We believe that installment payments provide a significant means for small businesses to overcome their main barrier to entry: lack of access to financing. And, a 25 percent bidding credit for minority and women-owned businesses together with a tax certificate program addresses the additional obstacles faced by those designated entities. The preferences adopted here reflect our desire to carefully balance the congressional mandate to ensure meaningful access for designated entities, with the goal of ensuring the expeditious delivery of new services and preventing abuses of our preference policies and procedures. We will continue to assess the effectiveness of the measures taken in this proceeding, and will apply any knowledge gained to subsequent auctions for other services.

71. We have decided not to provide bidding credits or other separate preferences for rural telephone companies bidding on narrowband PCS spectrum because we conclude that given the relatively modest build-out costs, such preferences are unnecessary to ensure the participation of rural telephone companies in the provision of this service to rural areas. Moreover, in view of the fact that rural telephone companies may use their existing infrastructure to provide integrated narrowband PCS services in their rural service areas, should they choose to do so, we believe that they will have ample opportunity to participate in narrowband PCS. Rural telephone companies will, however, be eligible for bidding credits if they are owned by women or minorities. They may also qualify for installment payments if they satisfy the eligibility criteria for small businesses.

1. Bidding Credits for Businesses Owned By Women And Minorities

72. In the Second Report and Order we stated that we would consider using bidding credits to encourage participation by designated entities in auctions. Upon consideration and review of the record on this subject, we believe that affording businesses owned by women and minorities a substantial bidding credit for certain specified narrowband PCS licenses is the most cost-effective and efficient means of achieving Congress' objective of "ensuring" the opportunity of these designated entities to participate in the provision of narrowband PCS services. Bidding credits will provide minority and female-owned firms with a significant advantage, which we believe is necessary to achieve this congressional goal, while preserving the advantages of open bidding competition. In effect, the bidding credit will function as a discount on the bid price a minority or female-owned firm will actually have to pay to obtain a license and, thus, will address directly the financing obstacles encountered by these entities. We also believe that a bidding credit in the amount of 25 percent is necessary to provide these designated entities with a significant enough advantage to ensure their ability to compete successfully for some narrowband PCS licenses. Thus, we will make a 25 percent bidding credit available to businesses owned by women and minorities bidding on the following licenses: (1) the nationwide licenses on Channel 5, Channel 8 and Channel 11; (2) all

regional licenses on Channel 13 and Channel 17; (3) all MTA licenses on Channel 19, 22, Channel 24, and (4) all BTA licenses on Channel 26. See 47 C.F.R. § 24.129.

73. As discussed in the Second Report and Order, Congress mandated that the Commission "ensure" the opportunity for participation in spectrum-based services by each category of designated entity, including businesses owned by minorities and women. This plain language leads us to conclude that adequate measures must be taken to assure that minority and female-owned businesses have the ability to participate in the provision of services subject to competitive bidding. Moreover, in enacting this legislation, it is clear that Congress was concerned about disseminating licenses to a wide variety of applicants and wanted the Commission to take meaningful steps to accomplish this goal. Indeed, Congress included a requirement in the statute that the Commission report to it in 1997 about, among other things, whether competitive bidding facilitated the introduction of new companies into the telecommunications market and whether designated entities "were able to participate successfully in the competitive bidding process" 47 U.S.C. § 309 (j)(12)(iv).

74. Apart from Congress' directive, we think that ensuring the opportunity for women and minorities to participate in narrowband PCS is important for the telecommunications industry. Companies owned by women and minorities can play a vital role in serving certain geographic areas and other niche markets that may be overlooked by other industry competitors, thus promoting our goal of universal access to telecommunications services. Not only will the industry become more diverse through the adoption of meaningful preferences, but we believe that a much wider customer base will obtain access to innovative technologies. Moreover, studies show that even when minority-owned firms do not locate within urban minority communities, they employ more minorities relative to other companies, thereby promoting our goals of equal employment opportunity, economic growth[41] and community economic development.[42]

75. The record reflects a severe underrepresentation of women and minorities in telecommunications. Indeed, the Commission's Small Business Advisory Committee (SBAC) found only 11 minority firms engaged in the delivery of cellular, specialized mobile radio,

---

[41] See e.g., 47 C.F.R. § 21.307, 22.307 (equal employment opportunity rules for common carriers); Implementation of the Commission's Equal Employment Opportunity Rules (Notice of Inquiry)(released April 21, 1994) ("[O]ur EEO rules enhance access by minorities and women to increased employment opportunities, which are the foundation for increasing opportunities for minorities and women in all facets of the communications industry, including participation in ownership. Thus, the rules . . . promote the further development of the broader communications infrastructure.")

[42] See e.g., Banking on Black Enterprise at 3.

radio paging, or messaging services.[43] Likewise, American Women in Radio and Television (AWRT) found that only 24 percent of small communications businesses are owned by women (and when companies without paid employees are excluded, women own less than 15 percent of small communications firms). See Comments of AWRT at 5. Many commenters observe that the factors that preclude minorities and women from effective participation involve access to financing. With regard to women they note that no existing FCC policy provides an incentive for women to enter the communications business, and that access to capital remains the biggest obstacle women business owners must face. Similarly, the SBAC states that minorities frequently do not or cannot use traditional sources of financing. Citing the U.S. Senate amicus brief in Metro Broadcasting, Inc. v. FCC, 110 S.Ct. 2997 (1990), the SBAC further asserts that "spectrum for radio facilities was first allocated at a time when undisguised discrimination in education, employment opportunities, and access to capital excluded minorities from all but token participation.'" The SBAC concludes that minorities were impeded from successfully competing for licenses when they were first awarded and, due to systematic barriers to technical training and employment opportunities, this situation has continued over time.[44]

76. Given this history of underrepresentation of minorities and women in telecommunications and the inability of these groups to access financing, we find that the best way we can accomplish these statutory mandates is to provide bidding credits exclusively to minority and female-owned businesses. The record demonstrates that women and minorities face barriers to entry not encountered by other firms, including other designated entities, and it is, therefore, appropriate and necessary that we provide them with a substantial bidding advantage.[45] In other contexts, Congress has recognized that the use of preferences in the licensing process can be necessary to remedy underrepresentation by minorities. For example, in 1982, Congress mandated the grant of a "significant preference" to minority applicants participating in lotteries for spectrum-based services. 47 U.S.C. § 309(i)(3)(A). And, in 1988, Congress attached a provision to the FCC appropriations legislation, which precluded the Commission from spending any appropriated funds to examine or change its minority broadcast preference policies.[46] Absent such measures targeted specifically to women and minorities, it would be virtually impossible to assure that these groups achieve any meaningful

---

[43] Report of the FCC Small Business Advisory Committee to the FCC Regarding Gen. Docket No. 99-314 (Sept. 15, 1993), reprinted at 8 FCC Rcd 7820, 7827 (1993) (SBAC Report).

[44] Id.

[45] See e.g., Comments of AWRT at 4-7; Call-Her at 5; Cook inlet at 38-39.

[46] Continuing Appropriations Act for Fiscal Year 1988, Pub.L. 100-102, 101 Stat. 1329-31.

measure of opportunity for actual participation in the provision of the services in question.[47]

77. We also agree with Call-Her that even comparatively large businesses owned by women and minorities face discriminatory lending practices and other discriminatory barriers to entry and, therefore, eligibility for bidding credits should not be limited to small firms. The narrowband auctions in question present a unique licensing opportunity that will allow these historically disadvantaged groups to gain a foot-hold in the communications industry.[48] ur goal is to encourage businesses owned by minorities and women to provide viable, sustained competition to incumbent providers and larger businesses. Therefore, we have accorded preferences to minority and women-owned firms regardless of their size. This approach is consistent with our auction rules and will further the statutory mandate to ensure participation by designated entities.[49]

---

[47] In the Second Report and Order, we addressed the constitutionality of gender and race-based preferences and concluded that the proper standard of scrutiny to be employed in this context is the "intermediate scrutiny" standard used in the Metro case. 110 S. Ct. 2997. We further concluded that under such a standard, preferences for women and minority-owned businesses are constitutionally permissible. We recognize that Metro's standard of review applies to measures approved by Congress. 110 S. Ct. at 3008-09. As noted above, the bidding credits in question here were expressly approved and, indeed, are required to achieve the statutory goals. See 47 U.S.C. § 309(j)(4)(D) (The Commission must "consider the use of tax certificates, bidding preferences, and other procedures" to ensure the participation of "small businesses, rural telephone companies, and businesses owned by members of minority groups and women."). Moreover, a number of commenters have argued that PCS licensees will be able to control the content of the transmissions carried on their facilities and that such transmissions can be analogous to media of mass communications. See e.g., Comments of UCC at 10-12; AWCC at 7-8; and ex parte filing of Frank Washington, April 26, 1994. To the extent this control exists, or is later developed, with regard to narrowband PCS, the preferences we adopt for minorities and women would be consistent with the important governmental interest identified in Metro: increasing minority ownership to encourage diversity in the provision of content.

[48] Because of the discrimination suffered by minorities and women as contractors and subcontractors in the telecommunications industry, see MBELDEF Study, this unique chance to enter the field as primary telecommunications providers, competing with, rather than dependent upon, other providers, is especially important.

[49] In the Second Report and Order, we recognized that ensuring the participation of only bona fide, qualified bidders in our auctions is an important aspect of complying with the competitive bidding statute's requirement that we promote a competitive marketplace, See e.g., 47 U.S.C. sec. 309(j)(3)(B). Thus we adopted a requirement that auction participants tender a substantial upfront payment, and we declined to create a general exception to this rule for designated entities. See Second Report and Order at ¶¶171, 186. Likewise, in designing preferences for women and minority-owned businesses, we want to ensure that

78. Congress clearly intended that businesses owned by minorities and women must be given the opportunity to participate in the provision of spectrum-based services independent of their status as small businesses. The plain language of Section 309(j)(4)(D) states that the Commission "shall . . . ensure" the opportunity for participation by "small businesses . . . and businesses owned by members of minority groups and women . . .." (emphasis added). If Congress had intended to limit the directive of Section 309(j)(4)(D) only to small businesses, no need would have existed to mention separately minorities and women. Moreover, Section 309(j)(4)(D) was added at Conference, and the Conference Report does not offer any suggestion that, to come within the section's purview, businesses owned by minorities or women must be small businesses. In contrast, and as we discussed more fully in the Second Report and Order , the legislative history of Section 309(j)(4)(A), relating to installment payments, expressly indicates that the provision was intended only to promote financial assistance for small businesses.[50] Accordingly, we shall interpret Section 309(j)(4)(D) in accordance with its plain language and will not limit its application to small businesses.[51]

79. In determining the appropriate amount of the bidding credit we considered several factors. First, our analysis of the market shows that, because of existing infrastructure and economies of scope, incumbent providers will have the ability to bid more than first-time operators. This is because, in most cases, incumbent providers, including extant wireless operators, telephone companies and cable operators, are able to make use of their existing infrastructure to provide PCS services.[52] The record demonstrates that very few incumbent

---

those companies that have the greatest ability to remain viable in the long run will have incentives to participate in the auction process. See Banking on Black Enterprise at 13 (government assistance should accrue to more capable black entrepreneurs, who are most likely to contribute to the goal of economic development).

[50] See Second Report and Order at ¶¶ 234-236.

[51] Even though small businesses are also mentioned in section 309(j)(4)(D), we do not believe bidding credits for small businesses are appropriate for narrowband PCS auctions. As a practical matter, due to the substantial capital necessary to construct a nationwide narrowband PCS system, most small businesses do not have the wherewithal to construct and operate the proposed systems. Accordingly, provisions designed to encourage participation by small entities in nationwide narrowband PCS service would be unlikely to result in the expeditious provision of new service to the public and therefore would be contrary to one of the principal objectives of the statutory auction provisions. Moreover, as to regional, MTA and BTA licenses, small businesses will be entitled to installment payments, which we believe will be sufficient to ensure their participation.

[52] Reed, David P., *Putting it all Together: The Cost Structure of Personal Communications Services*, OPP Working Paper 28, November 1992. Although this study examined the broadband PCS market, we expect that a similar incumbency advantage exists in

providers are minorities or women, so that a substantial discount is necessary to put these designated entities on equal footing with incumbents.[53] Several commenters indicate that a bidding credit of 25 percent or more was necessary to ensure the opportunity of businesses owned by women and minorities to participate in auctions.[54] Moreover, in the broadcast context, we held that licensees can transfer their stations to minorities in distress sales provided that the price is no more than 75 percent of market value.[55] This policy is based upon our finding that 25 percent is an appropriate discount to eliminate financial entry barriers for minority-owned companies seeking to become broadcast licensees. Likewise, we believe that a discount on the bid price in this amount will adequately ensure participation by a wide variety of minority and female-owned firms in narrowband PCS auctions and service provision. That being said, we note that this number is based also on our assessment of the capital entry requirements of the narrowband PCS service.[56] As discussed, we think that a 25 percent bidding credit is sufficient to ensure minority and female entry. It is not so substantial, however, as to foster participation by firms that are not otherwise financially capable of building-out a narrowband PCS network. In this regard, we emphasize that the financing requirements of other spectrum-based services may necessitate use of a different figure to provide the proper assurances. Therefore, we will continue to examine this issue on a service-by-service basis. We will also monitor carefully the effectiveness of the 25 percent bidding credit in the narrowband PCS auctions and continually assess whether it is achieving the goal of ensuring that minority and women-owned firms participate successfully in auctions for this service.

80. To prevent unjust enrichment by women and minorities trafficking in licenses acquired through the use of bidding credits, we will impose a forfeiture requirement on transfers of such licenses to entities that are not owned by women or minorities.[57] Female and minority-owned businesses seeking to transfer a license to an entity that is not owned by women or minorities will be required to reimburse the government for the amount of the bidding credit, plus interest at the rate imposed for installment financing at the time the

---

the narrowband PCS market.

[53] See e.g., Comments of AWCC at 13-14; Cook Inlet at 10-15; and UCC at 7-10.

[54] See comments of AIDE at 7; Devsha at 5; NABOB at 10-11; and ex parte filing of Personal Communications Network Services of New York at 2-3, each suggesting a bidding credit of 25 percent. Rocky Mountain Telephone proposes a 50 percent bidding credit. Comments of Rocky Mountain Telephone at 16. And Richard Vega proposes a 100 percent bidding credit for certain designated entities. Comments of Richard Vega at 7.

[55] See Lee Broadcasting Corp., 76 FCC 2d 462 (1980).

See supra n. 40.

[57] See Second Report and Order at ¶ 258.

license was awarded, before transfer will be permitted. The amount of the penalty will be reduced over time so that a transfer in the first two years of the license term will result in a forfeiture of 100 percent of the value of the bidding credit; in year three of the license term the penalty will be 75 percent; in year four the penalty will be 50 percent and in year five the penalty will be 25 percent, after which there will be no penalty. Furthermore, we have adopted strict eligibility criteria to ensure that only legitimate minority and women-owned firms are able to take advantage of bidding credits. See Second Report and Order at ¶¶ 277-278. In addition, to further ensure that our rules are as narrowly tailored as possible, while still fulfilling the statutory goal, we will prohibit publicly-traded companies from taking advantage of the bidding credits.

2. Tax Certificates

81. Congress instructed the Commission to consider the use of tax certificates to help ensure designated entity participation in spectrum-based services. See 47 U.S.C. § 309(j)(4)(D). In the Second Report and Order we observed that tax certificates could be useful as a means of attracting investors to designated entity enterprises and to encourage licensees to assign or transfer control of licenses to designated entities in post-auction transactions. We stated further that we would examine the feasibility of using this measure in subsequent service-specific auction rules. Second Report and Order at ¶ 251. After further consideration of this matter, we believe that tax certificates would be an appropriate tool to assist minority and female-owned businesses to attract start-up capital from non-controlling investors. In addition, we believe that tax certificates will give licensees the incentive to assign or transfer their authorizations to such entities in post-auction sales, thereby providing added assurance that minority and women-owned entities will have the opportunity to participate in narrowband PCS services. Accordingly, we will issue tax certificates to non-controlling initial investors in minority and female-owned narrowband PCS applicants, upon the sale of their non-controlling interests. We will also issue tax certificates to narrowband PCS licensees who assign or transfer control of their licenses to minority and women-owned entities.

82. As stated previously, the record reveals that women and minorities face barriers to entry not encountered by other designated entities. In particular, they have an especially difficult time accessing capital and, as a result, are severely underrepresented in the telecommunications industry. Together with the other preferences we adopt today, tax certificates should help to ensure the participation of minority and female-owned businesses in narrowband PCS services. This measure will make it easier for these designated entities to attract start-up capital because investors will know that they can defer taxes on any gains made when their interests are sold. In addition, tax certificates will provide incentives to licensees to seek out minority and female buyers in after-market sales because the licensees will be able to defer taxes on profits made in the sale.

83. We have used tax certificates over the years to encourage broadcast licensees and

cable television operators to transfer their stations and systems to minority buyers.[58] We also have granted tax certificates to shareholders in minority-controlled broadcast or cable entities who sell their shares, when such interests were acquired to assist in the financing of the acquisition of the facility.[59] These broadcast and cable tax certificates are issued pursuant to the Internal Revenue Code, 26 U.S.C. § 1071. While Congress' goal in authorizing tax certificates under Section 309(j)(4)(D) of the Act is somewhat different, and focuses on ensuring the opportunity for designated entities to participate in auctions and spectrum-based services, we think that it will be an equally valuable program. Issuance of tax certificates to investors and licensees that sell to minorities and women will augment the bidding credits preference, and together the measures should increase the ability of these entities to access financing, thus ensuring their opportunity to participate in narrowband PCS auctions and services.

84. In implementing this program, we will borrow from our existing tax certificate program and grant tax certificates, upon request, that will enable the licensees and investors meeting the criteria outlined here to defer the gain realized upon a sale either by: (1) treating it as an involuntary conversion under 26 U.S.C. § 1033, with the recognition of gain avoided by the acquisition of qualified replacement property; or (2) electing to reduce the basis of certain depreciable property, or both. Tax certificates will be available to initial investors in minority and female-owned businesses who provide "start-up" financing, which allows these businesses to acquire licenses at auction or in the aftermarket, and those investors who purchase interests within the first year after license issuance, which allows for the stabilization of the designated entities' capital base. Also, in accordance with our existing policy, to be eligible for a tax certificate, such investor transactions must not reduce minority or female ownership or control in the entity below 50.1 percent. The definition of a minority or female-owned entity is set forth in the Second Report and Order and, with regard to our investor tax certificate policy, the entity in which the investment is made must satisfy that definition at the time of the original investment as well as after the investor's shares are sold. For after-market sales, tax certificates will only be issued to licensees who sell to entities that meet that definition. Tax certificates will be granted only upon completion of the sale, although parties can request a declaratory ruling from the Commission regarding the tax consequences of prospective transactions.

---

[58] See Commission Policy Regarding the Advancement of Minority Ownership in Broadcasting, 92 FCC 2d 849 (1982)("1982 Policy Statement"); see also Statement of Policy on Minority Ownership of Broadcasting Facilities, 68 FCC 2d 979 (1978). We have also employed tax certificates as a means of encouraging fixed microwave operators to relocate from spectrum allocated to emerging technologies. See Third Report and Order and Memorandum Opinion and Order, ET Docket No. 92-9, 8 FCC Rcd 6589 (1993).

[59] 1982 Policy Statement, 92 FCC 2d at 855-58.

85. As with our other tax certificate policies, we are concerned about avoiding "sham" arrangements to obtain tax certificates and, pursuant to Section 309(j)(4)(E), thus adopt measures to prevent unjust enrichment. First, we intend to enforce strictly the definitions adopted in the Second Report and Order and will carefully review investment and purchase arrangements to ensure that 50.1 percent control and equity by minorities and women was, and will be, maintained. Second, like our existing tax certificate program,[60] we will impose a one-year holding requirement on the transfer or assignment of narrowband PCS licenses obtained through the benefit of tax certificates. We believe that the rapid resale of such licenses at a profit would subvert our goal of ensuring the opportunity to participate by minority and women-owned businesses, unless the buyer itself is a minority or female-owned business. The well-established one-year holding period would prevent this type of unjust enrichment. While this restriction will not be applied to assignments or transfers to qualified minority and female-owned businesses, assignees and transferees obtaining licenses pursuant to this exception will be subject to the one-year holding requirement.

3. Installment Payments

86. In this Report and Order, we adopt installment payments for small businesses bidding for any of the BTA, MTA or regional narrowband licenses. The record in this proceeding indicates that the most significant barrier for small business participation in the auctioning of narrowband PCS spectrum will be access to adequate private financing to ensure their ability to compete against larger firms in the competitive bidding process.[61] In the Second Report and Order, we concluded that installment payments are an effective means to address the inability of small businesses to obtain financing and will enable these entities to compete more effectively for the auctioned spectrum. We also determined that small businesses eligible for installment payments would only be required to pay half of the down payment (10 percent of the winning bid, as opposed to 20 percent) five days after the auction closes, with the remaining 10 percent payment deferred until five days after grant of the license. Finally, we indicated that installment payments should be made available to designated entities at an interest rate equal to the rate for U.S. Treasury obligations. See Second Report and Order at ¶¶ 236-240.

87. Based on our review of the record, we conclude that installment payments are an appropriate preference for small businesses bidding for the BTA, MTA or regional narrowband licenses. We have limited eligibility for installment payments to small businesses because we believe that our system of preferences should be designed to match the particular needs and characteristics of the eligible recipients. In this respect, installment payments will

---

[60] See Amendment of Section 73.3597 of the Commission's Rules, Memorandum Opinion and Order, 99 FCC 2d 971, 974 (1985).

[61] See e.g., Comments of SBA at 10-23; Palmer Communications at 3; NTIA at 27.

provide financial assistance to all small businesses, including small businesses owned by women and minorities and rural telephone companies that meet the small business definition. By allowing payment in installments, the government is in effect extending credit to licensees, thus reducing the amount of private financing needed prior to the auction. Such low cost government financing will promote participation by small businesses, which, because of their size, lack access to capital needed to participate in new spectrum opportunities such as narrowband PCS. We have decided to limit installment payments to those small businesses bidding on smaller spectrum blocks, specifically the BTA, MTA and regional licenses. This will deter potential abuse of the installment payment option by large firms and ensure that the public receives the maximum value for the use of spectrum. BTA, MTA and regional narrowband licenses are appropriately sized for development by bona fide small businesses. We estimate that the cost to build-out these licenses to meet the minimum population coverage requirements will be between $50,000 and $1 million. See supra n. 40. By contrast, the nationwide narrowband licenses will require capital commitments that are more suitable to large firms. Accordingly, we believe that application of installment payments to bidding on nationwide narrowband licenses is inappropriate to promote economic opportunity for small businesses. Installment payments for licenses of this magnitude may create incentives for large firms to create small business "fronts" to take advantage of low cost government financing or may result in payment defaults, which would prevent recovery for the public of the value of the spectrum and would hinder rapid deployment of service to the public.

88. The installment payment option will enable all small businesses to pay the full amount of their winning bid in installments (less the upfront payment, which must be paid in full, and the down payment, half of which is due five days after the auction closes and the other half five days after the application is granted). Generally, the terms and conditions of the installment payments will be the same as those provided in the general rules -- interest charges will be fixed at the time of licensing at a rate equal to the rate for ten-year U.S. Treasury obligations. Payments of interest only will be due for the first two years. Principal and interest payments will be amortized over the remaining years of the license. Timely payment of all installments will be a condition of the license grant and failure to make such timely payment will be grounds for revocation of the license.[62]

89. To ensure that large businesses do not become the unintended beneficiaries of preferences meant for small firms, we will use the unjust enrichment provisions adopted in the Second Report and Order applicable to installment payments. Specifically, if a small business making installment payments seeks to transfer a license to a non-small business entity during the term of the license, we will require payment of the remaining principal balance as a condition of the license transfer. Second Report and Order at ¶ 263.

---

[62] As described in the Second Report and Order, the Commission may, on a case-by-case basis permit a three to six month grace period within which the licensee may seek a restructuring of the payment plan.

VII. CONCLUSION

90. We believe that the competitive bidding rules we adopt for narrowband PCS, in conjunction with our spectrum allocation rules, will promote the public policy objectives set forth by Congress. Our rules will encourage economic growth and enhance access to narrowband PCS services for consumers, producers, and new entrants. Structuring our rules to promote opportunity and competition should result in the rapid implementation of new PCS services and encourage efficient spectrum use. The preferences we adopt for small businesses and businesses owned by women and minorities will help to promote access to narrowband PCS services by ensuring that these groups will genuine opportunities to participate in the auctions and in provision of service.

VIII. PROCEDURAL MATTERS AND ORDERING CLAUSES

A. Final Regulatory Flexibility Analysis

91. Pursuant to the Regulatory Flexibility Act of 1980, an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the Notice of Proposed Rule Making in PP Docket No. 93-253. Written comments on the IRFA were requested. The Commission's final analysis is as follows:

92. Need for and purpose of the action. This rulemaking proceeding was initiated to implement Section 309(j) of the Communications Act, as amended. The rules adopted herein will carry out Congress's intent to establish a system of competitive bidding for narrowband PCS licenses. The rules adopted herein also will carry out Congress's intent to ensure that small businesses, rural telephone companies, and businesses owned by women and minorities are afforded an opportunity to participate in the provision of spectrum-based services.

93. Issues raised in response to the IRFA. The IRFA noted that the proposals under consideration in the NPRM included the possibility of new reporting and recordkeeping requirements for a number of small business entities. No commenters responded specifically to the issues raised in the IRFA. We have made some modifications to the proposed requirements as appropriate.

94. Significant alternatives considered and rejected. All significant alternatives have been addressed in the Second Report and Order.

B. Ordering Clauses

95. Accordingly, IT IS ORDERED THAT Part 24 of the Commission's Rules is amended as set forth in the attached Appendix.

96. IT IS FURTHER ORDERED that the rules changes made herein WILL BECOME EFFECTIVE 30 days after their publication in the Federal Register. This action is taken pursuant to Sections 4(i), 303(r) and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r) and 309(j).

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

APPENDIX

RULES

Parts O and 24 of Chapter 1 of Title 47 of the Code of Federal Regulations are amended as follows:

Part O - Commission Organization

1. The authority citation for Part O continues to read as follows:

Authority: Sec. 5, 48 Stat. 1068, as amended; 47 U.S.C. 155.

2. Section 0.91 is amended by adding a new paragraph (n) to read as follows:

§ 0.91 Functions of the Bureau

* * * * *

(n) Develops, in coordination with the Office of Plans and Policy, policies for the selection of licenses from mutually exclusive applicants in the Common Carrier Service subject to competitive bidding; issues Public Notices announcing auctions for Common Carrier Service Licenses; specifies the licenses to be auctioned; the deadlines for filing short-form applications, filing fees, and submission of upfront payments; the time and place of the auction; the method of competitive bidding to be used; competitive bidding procedures including, but not limited to, designated entity preferences, applicable bid submission procedures, upfront payment requirements, activity rules, stopping rules, and bid withdrawal procedures.

3. The authority citation for Part 24 continues to read as follows:

AUTHORITY: Secs. 4, 301, 302, 303, 309 and 332, 48 Stat. 1066, 1082, as amended; 47 U.S.C. §§ 154, 301, 302, 303, 309 and 332, unless otherwise noted.

4. Section 24.10 is amended to read as follows:

Section 24.10 Scope.

This subpart contains some of the procedures and requirements for filing applications for licenses in the personal communications services. You should also consult Subparts F and G.

Other Commission rule parts of importance that may be referred to with respect to licensing and operation of radio services governed under this part include Parts 0, 1, 2, 5, 15, 17 and 20.

5. Section 24.129 is revised to read as follows:

Sec. 24.129 Frequencies.

The following frequencies are available for narrowband PCS. All licenses on channels indicated with an (**) will be eligible for bidding credits as set forth in Section 24.309(b) of this Part if competitive bidding is used to award such licenses.

(a) Eleven frequencies are available for assignment on a nationwide basis as follows:
(1) Five 50 kHz channels paired with 50 kHz channels:

Channel 1: 940.00-940.05 and 901.00-901.05 MHz;
Channel 2: 940.05-940.10 and 901.05-901.10 MHz;
Channel 3: 940.10-940.15 and 901.10-901.15 MHz;
Channel 4: 940.15-940.20 and 901.15-901.20 MHz; and,
Channel 5: 940.20-940.25 and 901.20-901.25 MHz.**

(2) Three 50 kHz channels paired with 12.5 kHz channels:

Channel 6: 930.40-930.45 and 901.7500-901.7625 MHz;
Channel 7: 930.45-930.50 and 901.7625-901.7750 MHz; and,
Channel 8: 930.50-930.55 and 901.7750-901.7875 MHz;**

(3) Three 50 kHz unpaired channels:

Channel 9: 940.75-940.80 MHz;
Channel 10: 940.80-940.85 MHz; and,
Channel 11: 940.85-940.90 MHz.**

(b) Six frequencies are available for assignment on a regional basis as follows:
(1) Two 50 kHz channels paired with 50 kHz channels:

Channel 12: 940.25-940.30 and 901.25-901.30 MHz; and,
Channel 13: 940.30-940.35 and 901.30-901.35 MHz.**

(2) Four 50 kHz channels paired with 12.5 kHz channels:

Channel 14: 930.55-930.60 and 901.7875-901.8000 MHz;
Channel 15: 930.60-930.65 and 901.8000-901.8125 MHz;

Channel 16: 930.65-930.70 and 901.8125-901.8250 MHz; and,
Channel 17: 930.70-930.75 and 901.8250-901.8375 MHz.**

(c) Seven frequencies are available for assignment on a MTA basis as follows:
(1) Two 50 kHz channels paired with 50 kHz channels:

Channel 18: 940.35-940.40 and 901.35-901.40 MHz; and,
Channel 19: 940.40-940.45 and 901.40 -901.45 MHz.**

(2) Three 50 kHz channels paired with 12.5 kHz channels:

Channel 20: 930.75-930.80 and 901.8375-901.8500 MHz;
Channel 21: 930.80-930.85 and 901.8500-901.8625 MHz; and,
Channel 22: 930.85-930.90 and 901.8625-901.8750 MHz.**

(3) Two 50 kHz unpaired channels:

Channel 23: 940.90-940.95 MHz; and,
Channel 24: 940.95-941.00 MHz.**

(d) Two 50 kHz channels paired with 12.5 kHz channels are available for assignment on a BTA basis:

Channel 25: 930.90-930.95 and 901.8750-901.8875 MHz; and,
Channel 26: 930.95-931.00 and 901.8875-901.9000 MHz.**

Note 1: Operations in markets or portions of markets which border other countries, such as Canada and Mexico, will be subject to on-going coordination arrangements with neighboring countries.

6. Section 24.130 (b) and (c) are revised to read as follows:

* * * * *

(b) The following four 12.5 kHz unpaired channels are available for assignment on a MTA basis:

A: 901.9000-901.9125 MHz;
B: 901.9125-901.9250 MHz;
C: 901.9250-901.9375 MHz; and
D: 901.9375-901.9500 MHz.

(c) The following four 12.5 kHz unpaired channels are available for assignment on a BTA basis:

E: 901.9500-901.9625 MHz;
F: 901.9625-901.9750 MHz;
G: 901.9750-901.9875 MHz; and
H: 901.9875-902.0000 MHz.

7. Part 24 is amended by adding a new Subpart F to read as follows:

Subpart F - Competitive Bidding Procedures for Narrowband PCS

Sec. 24.301 Narrowband PCS Subject to Competitive Bidding. Mutually exclusive initial applications to provide narrowband PCS service are subject to competitive bidding procedures. The general competitive bidding procedures found in 47 C.F.R. Part 1, Subpart Q, will apply unless otherwise provided in this part.

Sec. 24.302 Competitive Bidding Design for Narrowband PCS Licensing. (a) The Commission will employ the following competitive bidding designs when choosing from among mutually exclusive initial applications to provide narrowband PCS service:

(1) Single round sealed bid auctions (either sequential or simultaneous)

(2) Sequential oral auctions

(3) Simultaneous multiple round auctions

(b) The Commission may design and test alternative procedures. The Commission will announce by Public Notice before each auction the competitive bidding design to be employed in a particular auction.

(c) The Commission may use combinatorial bidding, which would allow bidders to submit all or nothing bids on combinations of licenses, in addition to bids on individual licenses. The Commission may require that to be declared the high bid, a combinatorial bid must exceed the sum of the individual bids by a specified amount. Combinatorial bidding may be used with any type of auction design.

(d) The Commission may use single combined auctions, which combine bidding for two or more substitutable licenses and award licenses to the highest bidders until the available licenses are exhausted. This technique may be used in conjunction with any type of auction.

Sec. 24.303 Competitive Bidding Mechanisms.

(a) Sequencing. The Commission will establish and may vary the sequence in which narrowband PCS licenses will be auctioned.

(b) Grouping. In the event the Commission uses either a simultaneous multiple round competitive bidding design or combinatorial bidding, the Commission will determine which licenses will be auctioned simultaneously or in combination.

(c) Reservation Price. The Commission may establish a reservation price, either disclosed or undisclosed, below which a license subject to auction will not be awarded.

(d) Minimum Bid Increments. The Commission may, by announcement before or during an auction, require minimum bid increments in dollar or percentage terms.

(e) Stopping Rules. The Commission may establish stopping rules before or during multiple round auctions in order to terminate an auction within a reasonable time.

(f) Activity Rules. The Commission may establish activity rules which require a minimum amount of bidding activity. In the event that the Commission establishes an activity rule in connection with a simultaneous multiple round auction, each bidder will be entitled to request and will be automatically granted five (5) waivers of such rule during the course of a single auction.

Sec. 24.304 Withdrawal, Default and Disqualification Penalties. (a) When the Commission conducts a simultaneous multiple round auction pursuant to § 24.302 (a)(3), the Commission will impose penalties on bidders who withdraw high bids during the course of an auction, or who default on payments due after an auction closes or who are disqualified.

(1) Bid withdrawal prior to close of auction. A bidder who withdraws a high bid during the course of an auction will be subject to a penalty equal to the difference between the amount bid and the amount of the winning bid the next time the license is offered by the Commission. No withdrawal penalty would be assessed if the subsequent winning bid exceeds the withdrawn bid. This penalty amount will be deducted from any upfront payments or down payments that the withdrawing bidder has deposited with the Commission.

(2) Default or disqualification after close of auction. If a high bidder defaults or is disqualified after the close of such an auction, the defaulting bidder will be subject to the penalty in subsection (1) plus an additional penalty equal to three (3) percent of the subsequent winning bid. If the subsequent winning bid exceeds the defaulting bidder's bid amount, the 3 percent penalty will be calculated based on the defaulting

bidder's bid amount. These amounts will be deducted from any upfront payments or down payments that the defaulting or disqualified bidder has deposited with the Commission.

(b) When the Commission conducts single round sealed bid auctions or sequential oral auctions, the Commission may modify the penalties to be paid in the event of bid withdrawal, default or disqualification; provided, however, that such penalties shall not exceed the penalties specified above.

(c) In the case of single round bidding for narrowband PCS licenses:

(1) If a bid is withdrawn before the Commission releases the initial Public Notice announcing the winning bidder(s), no bid withdrawal penalty will be assessed.

(2) If a bid is withdrawn after the Commission releases the initial Public Notice announcing the winning bidder(s), the bid withdrawal penalty will be equal to the difference between the high bid amount and the amount of the next highest valid bid. A bid will be considered valid for this purpose if the bidder has not already been designated the winning bidder on more licenses than it is permitted to be awarded. Losing bidders will only be subject to this bid withdrawal penalty for a period of 30 days after the Commission releases the initial Public Notice announcing the winning bidders.

(d) In the case of oral sequential bidding for narrowband PCS licenses:

(1) If a bid is withdrawn before the Commission has declared the bidding to be closed for the license bid on, no bid withdrawal penalty will be assessed.

(2) If a bid is withdrawn after the Commission has declared the bidding to be closed for the license bid on, the bid withdrawal penalty of section 1.2104(g) and subsections (a)(1) and (2) above will apply.

Sec. 24.305 Bidding Application (FCC Form 175 and 175-S Short-Form). All applicants for initial provision of narrowband PCS service must submit applications on FCC Forms 175 and 175-S pursuant to the procedures set forth in § 1.2105 of part 1 of this Chapter. The Commission will issue a Public Notice announcing the date of a narrowband PCS auction, the licenses which are to be auctioned, and the date on or before which applicants intending to participate in an upcoming narrowband PCS auction must file their applications in order to be eligible for that auction. The Public Notice will also contain information necessary for completion of the application as well as other important information such as the materials which must accompany the Forms, any filing fee that must accompany the application or any upfront payment that will need to be submitted, and the location where the application must be filed.

Sec. 24.306 Submission of Upfront Payments and Down Payments. (a) Where the Commission uses simultaneous multiple round auctions or oral sequential auctions bidders will be required to submit an upfront payment pursuant to the procedures set forth in Section 1.2106 of part 1 of this Chapter. (b) winning bidders in an auction must submit a down payment to the Commission in accordance with the procedures set forth in Section 1.2107 (a) and (b) of part 1 of this Chapter.

Sec. 24.307 Long Form Applications. Winning bidders will be required to submit long form applications on FCC form 401, as modified, within ten (10) business days after being notified that they are the winning bidder. Applications on FCC Form 401 shall be submitted pursuant to the procedures set forth in Subpart G and Section 1.2107 (c) and (d) of part 1 this Chapter and any associated Public Notices. Only auction winners will be eligible to file applications on FCC Form 401 for initial narrowband PCS licenses in the event of mutual exclusivity between applicants filing Form 175. Winning bidders need not complete Schedule B to Form 401.

Sec. 24.308 License Grant, Denial, Default, and Disqualification. (a) Winning Bidders are required to pay the balance of their winning bid in a lump sum payment within five (5) businesses days following the following the award of the license. Grant of the license will be conditioned upon full an timely payment of the winning bid amount. (b) A bidder who withdraws its bid, defaults on a payment or is disqualified will be subject to the penalties specified in Section 1.2109 of this Section.

Sec. 24.309 Designated Entities. Designated entities entitled to preferences in the narrowband PCS service are small businesses and businesses owned by members of minority groups and/or women as defined in Section 1.2110 (b) of this Chapter.

(a) Installment payments. Small businesses, including small businesses owned by women and/or minorities, will be eligible to pay the full amount of their winning bid on any regional, MTA or BTA license in installments over the term of the license pursuant to the terms set forth in Section 1.2110(d) of this Chapter.

(b) Bidding Credits. Businesses owned by women and/or minorities, including small businesses owned by women and/or minorities will be eligible for a twenty-five (25) percent bidding credit when bidding on the following licenses: (1) the nationwide licenses on Channel 5, Channel 8 and Channel 11; (2) all regional licenses on Channel 13 and Channel 17; (3) all MTA licenses on Channel 19, Channel 22, Channel 24; and (4) all BTA licenses on Channel 26. See 47 C.F.R. § 24.129. The bidding credit will reduce by 25 percent the bid price that businesses owned by women and/or minorities will be required to pay to obtain a license. The licenses that will be eligible for bidding credits are indicated by an (**) in

section 24.129 above.

(c) Tax Certificates. Any initial investor in a business owned by minorities and/or women and who provides "start-up" financing, which allows such business to acquire a narrowband PCS license(s), and any investor who purchases an ownership interest in a narrowband PCS licensee owned by minorities and/or women within the first year after license issuance, which allows for the stabilization of the entity's capital base, may, upon the sale of such investment or interest, request from the Commission a tax certificate, so long as such investor transaction does not reduce minority or female ownership or control in the entity below 50.1 percent. Any narrowband PCS licensee who assigns or transfers control of its license to a business owned by minorities and/or women may request that the Commission issue it a tax certificate.

(d) Unjust Enrichment. Designated entities using installment payments, bidding credits or tax certificates to obtain a narrowband PCS license will be subject to the following unjust enrichment provisions:

(1) If a small business paying for a narrowband PCS license in installment payments seeks to transfer a license to a non-small business entity during the term of the license, the remaining principal balance must be repaid as a condition of the license transfer.

(2) Female and minority-owned businesses seeking to transfer a license to an entity that is not owned by women or minorities will be required to reimburse the government for the amount of the bidding credit, plus interest at the rate imposed for installment financing at the time the license was awarded, before transfer will be permitted. The amount of this penalty will be reduced over time as follows: a transfer in the first two years of the license term will result in a forfeiture of 100 percent of the value of the bidding credit; in year three of the licenses term the penalty will be 75 percent; in year four the penalty will be 50 percent and in year five the penalty will be 25 percent, after which there will be no penalty.

(3) Any business owned by minorities and or women that obtains a narrowband PCS license through the benefit of tax certificates shall not assign or transfer control of its license within one year of its license grant date. If the assignee or transferee is a business owned by minorities and or women, this paragraph shall not apply; Provided, however, that the assignee or transferee shall not assign or transfer control of the license within one year of the grant date of the assignment or transfer.

8. Part 24 is amended by adding a new Subpart G to read as follows:

SUBPART G-Interim Application, Licensing and Processing Rules for Narrowband PCS

Sec. 24.403 Authorization required.

No person shall use or operate any device for the transmission of energy or communications by radio in the services authorized by this part except as provided in this part.

Sec. 24.404 Eligibility.

(a) General. Authorizations will be granted upon proper application if:

(1) The applicant is qualified under the applicable laws and the regulations, policies and decisions issued under those laws, including Sections 24.101 and 24.12;

(2) There are frequencies available to provide satisfactory service; and

(3) The public interest, convenience or necessity would be served by a grant.

(b) Alien ownership.

A narrowband PCS authorization to provide Commercial Mobile Radio Service may not be granted to or held by:

(1) Any alien or the representative of any alien.

(2) Any corporation organized under the laws of any foreign government.

(3) Any corporation of which any officer or director is an alien or of which more than one-fifth of the capital stock is owned of record or voted by aliens or their representatives or by a foreign government or representative thereof or any corporation organized under the laws of a foreign country.

(4) Any corporation directly or indirectly controlled by any other corporation of which any officer or more than one-fourth of the directors are aliens, or of which more than one-fourth of the capital stock is owned of record or voted by aliens, their representatives, or by a foreign government or representative thereof, or by any corporation organized under the laws of a foreign country, if the Commission finds that the public interest will be served by the refusal or revocation of such license.

A Narrowband PCS authorization to provide Private Mobile Radio Service may not be granted to or held by a foreign government or a representative thereof.

Sec. 24.405 Formal and informal applications.

(a) Except for an authorization under any of the conditions stated in section 308(a) of the Communications Act of 1934 (47 U.S.C. 308(a)), the Commission may grant only upon written application received by it, the following authorization: station licenses; modifications of licenses; renewals of licenses; transfers and assignments of station licenses, or any right thereunder.

(b) Except as may be otherwise permitted by this part, a separate written application shall be filed for each instrument of authorization requested. Applications may be:

(1) "Formal applications" where the Commission has prescribed in this Part a standard form; or

(2) "Informal applications" (normally in letter form) where the Commission has not prescribed a standard form.

(c) An informal application will be accepted for filing only if:

(1) A standard form is not prescribed or clearly applicable to the authorization requested;

(2) It is a document submitted, in duplicate, with a caption which indicates clearly the nature of the request, radio service involved, location of the station, and the application file number (if known); and

(3) It contains all the technical details and informational showings required by the rules and states clearly and completely the facts involved and authorization desired.

Sec. 24.406 Filing of Narrowband PCS applications, fees, and numbers of copies.

(a) As prescribed by Sections 24.305, 24.307, and 24.409 of this part, standard formal application forms applicable to the narrowband PCS may be obtained from either:

(1) Federal Communications Commission, Washington, DC 20554; or

(2) by calling the Commission's Forms Distribution Center, (202) 632-3676.

(b) Applications for the initial provision of narrowband PCS service must be filed on FCC Form 175 in accordance with the rules in Section 24. 305 and Part 1, Subpart Q. In the event of mutual exclusivity between applicants filing FCC Form 175, only auction winners will be eligible to file subsequent long form applications on FCC Form 401 for initial narrowband PCS licenses. Mutually exclusive applications filed on Form 175 are subject to competitive bidding under those rules. Narrowband PCS applicants filing Form 401 need not complete

Schedule B.

(c) All applications for Narrowband PCS radio station authorizations (other than applications for initial provision of narrowband PCS service filed on FCC Form 175) shall be submitted for filing to: Federal Communications Commission, Washington, DC 20554, Attention: Narrowband PCS Processing Section. Applications requiring fees as set forth at Part 1, Subpart G of this chapter must be filed in accordance with Sec. 0.401(b).

(d) All correspondence or amendments concerning a submitted application shall clearly identify the name of the applicant, applicant identification number or Commission file number (if known) or station call sign of the application involved, and may be sent directly to the Common Carrier Bureau, Narrowband PCS Processing Section.

(e) Except as otherwise specified, all applications, amendments, correspondence, pleadings and forms (including FCC Form 175) shall be submitted on one original paper copy and with three microfiche copies, including exhibits and attachments thereto, and shall be signed as prescribed by Sec. 1.743. Filings of five pages or less are exempt from the requirement to submit on microfiche, as well as emergency filings like letters requesting special temporary authority. Those filing any amendments, correspondence, pleadings, and forms must simultaneously submit the original hard copy which must be stamped "original". In addition to the original hard copy, those filing pleadings, including pleadings under Section 1.2108 of the rules shall also submit 2 paper copies as provided in Sec. 1.51 of the rules.

(1) Microfiche copies. Each microfiche copy must be a copy of the signed original. Each microfiche copy shall be a 148mm X 105mm negative (clear transparent characters appearing on an opaque background) at 24X to 27X reduction for microfiche or microfiche jackets. One of the microfiche sets must be a silver halide camera master or a copy made on silver halide film such as Kodak Direct Duplicatory Film. The microfiche must be placed in paper microfiche envelopes and submitted in a B6 (125 mm x 176 mm) or 5 x 7.5 inch envelope. All applicants must leave Row "A" (the first row for page images)of the first fiche blank for in-house identification purposes.

(2) All applications and all amendments must have the following information printed on the mailing envelope, the microfiche envelope, and on the title area at the top of the microfiche:

(i) The name of the applicant;

(ii) The type of application (e.g. nationwide, regional, MTA, BTA, response channel);

(iii) The month and year of the document;

(iv) Name of the document;

(v) File number, applicant identification number, and call sign, if assigned; and

(vi) The identification number and date of the Public Notice announcing the auction in response to which the application was filed (if applicable).

Each microfiche copy of pleadings shall include:

(A) The month and year of the document;

(B) Name of the document;

(C) Name of the filing party;

(D) File number, applicant identification number, and call sign, if assigned;

(E) The identification number and date of the Public Notice announcing the auction in response to which the application was filed (if applicable). Abbreviations may be used if they are easily understood.

Sec. 24.407-8 [Reserved]

Sec. 24.409 Standard application forms and permissive changes or minor modifications for the narrowband Personal Communications Service.

(a) Applications for the initial provision of narrowband PCS service must be filed on FCC Forms 175 and 175-S.

(b) Subsequent application by auction winners or non-mutually exclusive applicants for narrowband PCS radio station(s) under Part 24. FCC Form 401 ("Application for New or Modified Common Carrier Radio Station Under Part 22") shall be submitted by each auction winner for each narrowband PCS license applied for on FCC Form 175. In the event that mutual exclusivity does not exist between applicants filing FCC Form 175, the Commission will so inform the applicant and the applicant will also file FCC Form 401. Blanket licenses are granted for each market frequency block. Applications for individual sites are not needed and will not be accepted. See Section 24.11. Narrowband PCS applicants filing Form 401 need not complete Schedule B.

(c) Extensions of time and reinstatement. When a licensee cannot complete construction in accordance with the provisions of Sec. 24.103, a timely application for extension of time (FCC Form 489) must be filed.

(d) License for mobile subscriber station--These stations are considered to be associated

with and covered by the authorization issued to the carrier serving the land mobile station. No additional authorization is required.

Sec. 24.410 [Reserved]

Sec. 24.411 Miscellaneous forms.

(a) Licensee qualifications. FCC Form 430 ("Common Carrier and Satellite Radio Licensee Qualifications Report") shall be filed by Narrowband Personal Communications Service licensees only as required by Form 490 (Application for Assignment or Transfer of Control Under Part 22).

(b) Renewal of station license. Except for renewal of special temporary authorizations, FCC Form 405 ("Application for Renewal of Station License") must be filed in duplicate by the licensee between thirty (30) and sixty (60) days prior to the expiration date of the license sought to be renewed.

Sec. 24.412 [Reserved]

Sec. 24.413 General application requirements.

(a) Each application (including applications filed on Forms 175 and 401) for a radio station authorization or for consent to assignment or transfer of control in the narrowband PCS shall disclose fully the real party or parties in interest and must include the following information:

(1) A list of its subsidiaries, if any. Subsidiary means any business five per cent or more whose stock, warrants, options or debt securities are owned by the applicant or an officer, director, stockholder or key management personnel of the applicant. This list must include a description of each subsidiary's principal business and a description of each subsidiary's relationship to the applicant.

(2) A list of its affiliates, if any. Affiliates means any business which holds a five per cent or more interest in the applicant, or any business in which a five per cent or more interest is held by another company which holds a five per cent interest in the applicant (e.g. Company A owns 5% of Company B and 5% of Company C; Companies B and C are affiliates).

(3) A list of the names, addresses, citizenship and principal business of any person holding five per cent or more of each class of stock, warrants, options or debt securities together with the amount and percentage held, and the name, address, citizenship and principal place of

business of any person on whose account, if other than the holder, such interest is held. If any of these persons are related by blood or marriage, include such relationship in the statement.

(4) In the case of partnerships, the name and address of each partner, each partner's citizenship and the share or interest participation in the partnership. This information must be provided for all partners, regardless of their respective ownership interests in the partnership. A signed and dated copy of the partnership agreement must be included in the application. This information must be included in Exhibit V of the application.

(b) Each application for a radio station authorization in the narrowband PCS must:

(1) Submit the information required by the Commission's rules, requests, and application forms;

(2) Be maintained by the applicant substantially accurate and complete in all significant respects in accordance with the provisions of Sec. 1.65 of this chapter; and

(3) Show compliance with and make all special showings that may be applicable.

(c) Where documents, exhibits, or other lengthy showings already on file with the Commission contain information which is required by an application form, the application may specifically refer to such information, if:

(1) The information previously filed is over one A4 (21 cm x 29.7 cm) or 8.5 x 11 inch (21.6 cm x 27.9 cm) page in length, and all information referenced therein is current and accurate in all significant respects under Section 1.65 of this chapter; and

(2) The reference states specifically where the previously filed information can actually be found, including mention of:

(i) The station call sign or application file number whenever the reference is to station files or previously filed applications;

(ii) The title of the proceeding, the docket number, and any legal citations, whenever the reference is to a docketed proceeding.

However, questions on an application form which call for specific technical data, or which can be answered by a "yes" or "no" or other short answer shall be answered as appropriate and shall not be cross-referenced to a previous filing.

(d) In addition to the general application requirements of Subpart F and Secs. 1.2105, 24.413 and 24.415 of this part, applicants shall submit any additional documents, exhibits, or signed written statements of fact:

(1) As may be required by these rules; and

(2) As the Commission, at any time after the filing of an application and during the term of any authorization, may require from any applicant, permittee, or licensee to enable it to determine whether a radio authorization should be granted, denied, or revoked.

(e) Except when the Commission has declared explicitly to the contrary, an informational requirement does not in itself imply the processing treatment of decisional weight to be accorded the response.

(f) All applicants (except applicants filing FCC Form 175) are required to indicate at the time their application is filed whether or not a Commission grant of the application may have a significant environmental impact as defined by Sec. 1.1307 of the Commission's rules. If answered affirmatively, the requisite environmental assessment as prescribed in Sec. 1.1311 of this chapter must be filed with the application and Commission environmental review must be completed prior to construction. See Sec. 1.1312 of this chapter. All narrowband PCS licensees are subject to a continuing obligation to determine whether subsequent construction may have a significant environmental impact prior to undertaking such construction and to otherwise comply with Section 1.1301 et seq. of the Commission's Rules. See Section 1.1312.

Sec. 24.414 [Reserved]

Sec. 24.415 Technical content of applications; maintenance of list of station locations.

(a) All applications required by this part shall contain all technical information required by the application forms or associated Public Notice(s). Applications other than initial applications for a narrowband PCS license must also comply with all technical requirements of the rules governing the narrowband PCS (see Subparts C and D as appropriate). The following paragraphs describe a number of general technical requirements.

(b) Each application (except applications for initial licenses filed on Form 175) for a radio station authorization for narrowband PCS must comply with the provisions of Sections 24.129-24.135.

(c)-(i) [Reserved]

(j) The location of the transmitting antenna shall be considered to be the station location. Narrowband PCS licensees must maintain a current list of all station locations, which must describe the transmitting antenna site by its geographical coordinates and also by conventional reference to street number, landmark, or the equivalent. All such coordinates shall be specified in terms of degrees, minutes, and seconds to the nearest second of latitude and longitude.

Sec. 24.416 Station Antenna Structures.

(a) Unless the narrowband PCS licensee has received prior approval from the FCC, no antenna structure, including radiating elements, tower, supports and all appurtenances, may be higher than 61 m (200 feet) above ground level at its site.

(b) Unless the narrowband PCS licensee has received prior approval from the FCC, no antenna structure at an airport or heliport that is available for public use and is listed in the Airport Directory of the current Airman's Information Manual or in either the Alaska or Pacific Airman's Guide and Chart Supplement; or at an airport or heliport under construction that is the subject of a notice or proposal on file with the FAA, and except for military airports, it is clearly indicated that the airport will be available for public use; or at an airport or heliport that is operated by the armed forces of the United States; or at a place near any of these airports or heliports, may be higher than:

(1) 1 m above the airport elevation for each 100 m from the airport runway longer than 1 km within 6.1 km of the antenna structure.

(2) 2 m above the airport elevation for each 100 m from the nearest runway shorter than 1 km within 3.1 km of the antenna structure.

(3) 4 m above the airport elevation for each 100 m from the nearest landing pad within 1.5 km of the antenna structure.

(c) A narrowband PCS station antenna structure no higher than 6.1 m (10 feet) above ground level at its site or no higher than 6.1 m above any natural object or existing manmade structure, other than an antenna structure, is exempt from the requirements of paragraphs (a) and (b) of this section.

(d) Further details as to whether an aeronautical study and/or obstruction marking and lighting may be required, and specifications for obstruction marking and lighting are contained in Part 17 of the FCC Rules, Construction, Marking and Lighting of Antenna Structures. To request approval to place an antenna structure higher than the limits specified in paragraphs (a), (b), and (c) of this section, the licensee must notify the Federal Aviation Administration (FAA) on FAA Form 7460-1 and the FCC on FCC Form 854.

Secs. 24.417--24.418 [Reserved]

Sec. 24.419 Waiver of rules.

(a) Request for waivers. (1) Waivers of these rules may be granted upon application or by the Commission on its own motion. Requests for waivers shall contain a statement of reasons sufficient to justify a waiver. Waivers will not be granted except upon an affirmative showing:

(i) That the underlying purpose of the rule will not be served, or would be frustrated, by its application in a particular case, and that grant of the waiver is otherwise in the public interest; or

(ii) That the unique facts and circumstances of a particular case render application of the rule inequitable, unduly burdensome or otherwise contrary to the public interest. Applicants must also show the lack of a reasonable alternative.

(2) If the information necessary to support a waiver request is already on file, the applicant may cross-reference to the specific filing where it may be found.

(b) Denial of waiver, alternate showing required. If a waiver is not granted, the application will be dismissed as defective unless the applicant has also provided an alternative proposal which complies with the Commission's rules (including any required showings).

Sec. 24.420 Defective applications.

(a) Unless the Commission shall otherwise permit, an application will be unacceptable for filing and will be returned to the applicant with a brief statement as to the omissions or discrepancies if:

(1) The application is defective with respect to completeness of answers to questions, informational showings, execution, or other matters of a formal character; or

(2) The application does not comply with the Commission's rules, regulations, specific requirements for additional information or other requirements.

See also Section 1.2105.

(b) Some examples of common deficiencies which result in defective applications under paragraph (a) of this section are:

(1) The application is not filled out completely and signed;

(2)-(4) [Reserved]

(5) The application (other an application filed on FCC Form 175) does not include an environmental assessment as required for an action that may have a significant impact upon the environment, as defined in Sec. 1.1307 of this chapter.

(6) [Reserved]

(7) The application is filed prior to the Public Notice issued under Section 24.305 of this Part announcing the application filing date for the relevant auction or after the cutoff date prescribed in that Public Notice;

(c) [Reserved]

(d) If an applicant is requested by the Commission to file any documents or any supplementary or explanatory information not specifically required in the prescribed application form, a failure to comply with such request within a specified time period will be deemed to render the application defective and will subject it to dismissal.

Sec. 24.421 Inconsistent or conflicting applications.

While an application is pending and undecided, no subsequent inconsistent or conflicting application may be filed by the same applicant, his successor or assignee, or on behalf or for the benefit of the same applicant, his successor or assignee.

Sec. 24.422 Amendment of application for Narrowband Personal Communications Service filed on FCC Form 175.

(a) The Commission will provide bidders a limited opportunity to cure defects in FCC Form 175 specified herein except for failure to sign the application and to make certifications, defects which may not be cured. See also Section 1.2105.

(b) In the Narrowband PCS, the only amendments to FCC Form 175 which will be permitted are minor amendments to correct minor errors or defects such as typographical errors. All other amendments to FCC Form 175, such as ownership changes or changes in the identification of parties to bidding consortia, will be considered to be major amendments. An FCC Form 175 which is amended by a major amendment will be considered to be newly filed and cannot be resubmitted after applicable filing deadlines. See also Section 1.2105.

Sec. 24.423 Amendment of applications for Narrowband Personal Communications Service (other than applications filed on FCC Form 175). This section applies to all applications for Narrowband Personal Communications Service other than applications filed on FCC Form 175.

(a) Amendments as of right. A pending application may be amended as a matter of right if the application has not been designated for hearing.

(1) Amendments shall comply with Sec. 24.429, as applicable; and

(2) Amendments which resolve interference conflicts or amendments under Sec. 24.429 may be filed at any time.

(b) The Commission or the presiding officer may grant requests to amend an application designated for hearing only if a written petition demonstrating good cause is submitted and properly served upon the parties of record.

(c) Major amendments, minor amendments. The Commission will classify all amendments as minor except in the cases listed below. An amendment shall be deemed to be a major amendment subject to Sec. 24.427 under any of the following circumstances:

(1) Change in technical proposal. If the amendment results in a substantial change in the engineering proposal such as (but not necessarily limited to) a change in, or an addition of, a radio frequency; or

(2) Amendment to proposed service area. If the amendment extends the reliable service area of the proposed facilities outside its MTA, BTA, or other applicable market area as defined in Section 24.102; or

(3) A substantial change in ownership or control.

(d) If a petition to deny (or other formal objection) has been filed, any amendment, requests for waiver, (or other written communications) shall be served on the petitioner, unless waiver of this requirement is granted pursuant to paragraph (e) of this section. See also Section 1.2108.

(e) The Commission may waive the service requirements of paragraph (d) of this section and prescribe such alternative procedures as may be appropriate under the circumstances to protect petitioners' interests and to avoid undue delay in a proceeding, if an applicant submits a request for waiver which demonstrates that the service requirement is unreasonably burdensome.

(f) Any amendment to an application shall be signed and shall be submitted in the same manner, and with the same number of copies, as was the original application. Amendments may be made in letter form if they comply in all other respects with the requirements of this chapter.

(g) An application will be considered to be a newly filed application if it is amended by a major amendment (as defined in this section), except in the following circumstances:

(1) [Reserved]

(2) [Reserved]

(3) The amendment reflects only a change in ownership or control found by the Commission to be in the public interest;

(4) [Reserved]

(5) The amendment corrects typographical transcription, or similar clerical errors which are clearly demonstrated to be mistakes by reference to other parts of the application, and whose discovery does not create new or increased frequency conflicts;

(6) The amendment does not create new or increased frequency conflicts, and is demonstrably necessitated by events which the applicant could not have reasonably foreseen at the time of filing, such as, for example:

(i) The loss of a transmitter or receiver site by condemnation, natural causes, or loss of lease or option; or

(ii) Obstruction of a proposed transmission path caused by the erection of a new building or other structure.

Sec. 24.424 [Reserved]

Sec. 24.425 Application for temporary authorizations.

(a) In circumstances requiring immediate or temporary use of facilities, request may be made for special temporary authority to install and/or operate new or modified equipment. Any such request may be submitted as an informal application in the manner set forth in Sec. 24.405 and must contain full particulars as to the proposed operation including all facts sufficient to justify the temporary authority sought and the public interest therein. No such request will be considered unless the request is received by the Commission at least 10 days prior to the date of proposed construction or operation or, where an extension is sought, expiration date of the existing temporary authorization. A request received within less than 10 days may be accepted upon due showing of sufficient reasons for the delay in submitting such request.

(b) Special temporary authorizations may be granted without regard to the 30-day public notice requirements of Sec. 24.427(b) when:

(1) The authorization is for a period not to exceed 30 days and no application for regular operation is contemplated to be filed;

(2) The authorization is for a period not to exceed 60 days pending the filing of an application for such regular operation;

(3) The authorization is to permit interim operation to facilitate completion of authorized construction or to provide substantially the same service as previously authorized; or

(4) The authorization is made upon a finding that there are extraordinary circumstances requiring operation in the public interest and that delay in the institution of such service would seriously prejudice the public interest.

(c) Temporary authorizations of operation not to exceed 180 days may be granted under the standards of section 309(f) of the Communications Act where extraordinary circumstances so require. Extensions of the temporary authorization for a period of 180 days each may also be granted, but the renewal applicant bears a heavy burden to show that extraordinary circumstances warrant such an extension.

(d) In cases of emergency found by the Commission, involving danger to life or property or due to damage of equipment, or during a national emergency proclaimed by the president or declared by the Congress or during the continuance of any war in which the United States is engaged and when such action is necessary for the national defense or safety or otherwise in furtherance of the war effort, or in cases of emergency where the Commission finds that it would not be feasible to secure renewal applications from existing licensees or otherwise to follow normal licensing procedure, the Commission will grant radio station authorizations and station licenses, or modifications or renewals thereof, during the emergency found by the Commission or during the continuance of any such national emergency or war, as special temporary licenses, only for the period of emergency or war requiring such action, without the filing of formal applications.

Processing of Applications

Sec. 24.426 Receipt of application; applications in the narrowband Personal Communications Services filed on FCC Form 175 and other applications in the narrowband PCS Service.

(a) All applications for the initial provision of narrowband PCS service must be submitted on FCC Forms 175 and 175-S. Mutually exclusive initial applications in the narrowband Personal Communications Services are subject to competitive bidding. FCC Form 401 ("Application for New or Modified Common Carrier Radio Station Under Part 22") must be submitted by each winning bidder for each narrowband PCS license applied for on FCC Form 175. In the event that mutual exclusivity does not exist between applicants filing FCC Form 175, the applicant will also file FCC Form 401. The aforementioned Forms 175, 175-S, and 401 are subject to the provisions of 47 C.F.R. Part 1, Subpart Q ("Competitive Bidding

Proceedings") and Subpart F of this Part. Blanket licenses are granted for each market frequency block. Applications for individual sites are not needed and will not be accepted. See Section 24.11.

(b) Applications received for filing are given a file number. The assignment of a file number to an application is merely for administrative convenience and does not indicate the acceptance of the application for filing and processing. Such assignment of a file number will not preclude the subsequent return or dismissal of the application if it is found to be not in accordance with the Commission's rules.

(c) Acceptance of an application for filing merely means that it has been the subject of a preliminary review as to completeness. Such acceptance will not preclude the subsequent return or dismissal of the application if it is found to be defective or not in accordance with the Commission's rules. (See Sec. 24.413 for additional information concerning filing of applications.)

Sec. 24.427 Public notice period.

(a) At regular intervals, the Commission will issue a public notice listing:

(1) The acceptance for filing of all applications and major amendments thereto;

(2) Significant Commission actions concerning applications listed as acceptable for filing;

(3) Information which the Commission in its discretion believes of public significance. Such notices are solely for the purpose of informing the public and do not create any rights in an applicant or any other person.

(4) Special environmental considerations as required by Part 1 of this chapter.

(b) The Commission will not grant any application until expiration of a period of thirty (30) days following the issuance date of a public notice listing the application, or any major amendments thereto, as acceptable for filing. Provided, that the Commission will not grant an application filed on Form 401 filed either by a winning bidder or by an applicant whose Form 175 application is not mutually exclusive with other applicants, until the expiration of a period of forty (40) days following the issuance of a public notice listing the application, or any major amendments thereto, as acceptable for filing. See also Section 1.2108.

(c) As an exception to paragraphs (a)(1), (a)(2) and (b) of this section, the public notice provisions are not applicable to applications:

(1) For authorization of a minor technical change in the facilities of an authorized station where such a change would not be classified as a major amendment (as defined by Sec.

24.423) were such a change to be submitted as an amendment to a pending application;

(2) For issuance of a license subsequent to a radio station authorization or, pending application for a grant of such license, any special or temporary authorization to permit interim operation to facilitate completion of authorized construction or to provide substantially the same service as would be authorized by such license;

(3) For extension of time to complete construction of authorized facilities, see Section 24.103;

(4) For temporary authorization pursuant to Sec. 24.425(b);

(5) [Reserved]

(6) For an authorization under any of the proviso clauses of section 308(a) of the Communications Act of 1934 (47 U.S.C. 308(a));

(7) For consent to an involuntary assignment or transfer of control of a radio authorization; or

(8) For consent to a voluntary assignment or transfer of control of a radio authorization, where the assignment or transfer does not involve a substantial change in ownership or control.

Sec. 24.428 Dismissal and return of applications.

(a) Except as provided under Sec. 24.429, any application may be dismissed without prejudice as a matter of right if the applicant requests its dismissal prior to designation for hearing or, in the case of applications filed on Forms 175 and 175-S, prior to auction. An applicant's request for the return of his application after it has been accepted for filing will be considered to be a request for dismissal without prejudice. Applicants requesting dismissal of their applications are also subject to Section 1.2104. Requests for dismissal shall comply with the provisions of Sec. 24.429 as appropriate.

(b) A request to dismiss an application without prejudice will be considered after designation for hearing only if:

(1) A written petition is submitted to the Commission and is properly served upon all parties of record, and

(2) The petition complies with the provisions of Sec. 24.429 (whenever applicable) and demonstrates good cause.

(c) The Commission will dismiss an application for failure to prosecute or for failure to respond substantially within a specified time period to official correspondence or requests for additional information. Dismissal shall be without prejudice if made prior to designation for hearing or prior to auction, but dismissal may be made with prejudice for unsatisfactory compliance with Sec. 24.429 or after designation for hearing or after the applicant is notified that it is the winning bidder under the auction process.

Sec. 24.429 Ownership changes and agreements to amend or to dismiss applications or pleadings.

(a) Applicability. Subject to the provisions of Sec. 1.2105 (Bidding Application and Certification Procedures; Prohibition of Collusion), this section applies to applicants and all other parties interested in pending applications who wish to resolve contested matters among themselves with a formal or an informal agreement or understanding. This section applies only when the agreement or understanding will result in:

(1) A major change in the ownership of an applicant to which Sec. 24.423 (c) and 24.423 (g) would apply or which would cause the applicant to lose its status as a designated entity under Section 24.309, or

(2) The individual or mutual withdrawal, amendment or dismissal of any pending application, amendment, petitioner or other pleading.

(b) Policy. Parties to contested proceedings are encouraged to settle their disputes among themselves. Parties which, under a settlement agreement, apply to the Commission for ownership changes or for the amendment or dismissal of either pleadings or applications, shall at the time of filing notify the Commission that such filing is the result of an agreement or understanding.

(c) If the amendment would, if granted, cause the applicant to lose its status as a designated entity under Section 24.309, the applicant must comply with the obligations imposed by Sections 24.309 (Designated Entities) and 1.2111 (Assignment of transfer of control; unjust enrichment) before the amendment will be granted.

(d) The provisions of Section 22.927 will apply in the event of the individual or mutual withdrawal, amendment or dismissal of any pending application, amendment, petitioner or other pleading.

Sec. 24.430 Opposition to applications.

(a) Petitions to deny (including petitions for other forms of relief) and responsive pleadings for Commission consideration must comply with Section 1.2108 and must:

(1) Identify the application or applications (including applicant's name, station location, Commission file numbers and radio service involved) with which it is concerned;

(2) Be filed in accordance with the pleading limitations, filing periods, and other applicable provisions of Secs. 1.41 through 1.52 except where otherwise provided in Section 1.2108;

(3) Contain specific allegations of fact which, except for facts of which official notice may be taken, shall be supported by affidavit of a person or persons with personal knowledge thereof, and which shall be sufficient to demonstrate that the petitioner (or respondent) is a party in interest and that a grant of, or other Commission action regarding, the application would be prima facie inconsistent with the public interest;

(4) Be filed within thirty (30) days after the date of public notice announcing the acceptance for filing of any such application or major amendment thereto (unless the Commission otherwise extends the filing deadline); and

(5) Contain a certificate of service showing that it has been mailed to the applicant no later than the date of filing thereof with the Commission.

(b) A petition to deny a major amendment to a previously filed application may only raise matters directly related to the amendment which could not have been raised in connection with the underlying, previously filed application. This does not apply to petitioners who gain standing because of the major amendment.

Sec. 24.431 Mutually exclusive applications.

(a) The Commission will consider applications to be mutually exclusive if their conflicts are such that the grant of one application would effectively preclude by reason of harmful electrical interference, or other practical reason, the grant of one or more of the other applications. The Commission will presume "harmful electrical interference" to mean interference which would result in a material impairment to service rendered to the public despite full cooperation in good faith by all applicants or parties to achieve reasonable technical adjustments which would avoid electrical conflict.

(b) Mutually exclusive applications filed on Form 175 for the initial provision of narrowband PCS service are subject to competitive bidding in accordance with the procedures in Subpart F and in Part 1, Subpart Q.

(c) An application will be entitled to comparative consideration with one or more conflicting applications only if the Commission determines that such comparative consideration will serve the public interest.

(d)-(j) Reserved

Sec. 24.432 Consideration of applications.

(a) Applications for an instrument of authorization will be granted if, upon examination of the application and upon consideration of such other matters as it may officially notice, the Commission finds that the grant will serve the public interest, convenience, and necessity. See also Section 1.2108.

(b) The grant shall be without a formal hearing if, upon consideration of the application, any pleadings or objections filed, or other matters which may be officially noticed, the Commission finds that:

(1) The application is acceptable for filing, and is in accordance with the Commission's rules, regulations, and other requirements;

(2) The application is not subject to a post-auction hearing or to comparative consideration pursuant to Sec. 24.431 with another application(s);

(3) A grant of the application would not cause harmful electrical interference to an authorized station;

(4) There are no substantial and material questions of fact presented; and

(5) The applicant is qualified under current FCC regulations and policies.

(c) If the Commission should grant without a formal hearing an application for an instrument of authorization which is subject to a petition to deny filed in accordance with Sec. 24.430, the Commission will deny the petition by the issuance of a Memorandum Opinion and Order which will concisely report the reasons for the denial and dispose of all substantial issues raised by the petition.

(d) Whenever the Commission, without a formal hearing, grants any application in part, or subject to any terms or conditions other than those normally applied to applications of the same type, it shall inform the applicant of the reasons therefor, and the grant shall be considered final unless the Commission should revise its action (either by granting the application as originally requested, or by designating the application for a formal evidentiary hearing) in response to a petition for reconsideration which:

(1) Is filed by the applicant within thirty (30) days from the date of the letter or order giving the reasons for the partial or conditioned grant;

(2) Rejects the grant as made and explains the reasons why the application should be

granted as originally requested; and,

(3) Returns the instrument of authorization.

(e) The Commission will designate an application for a formal hearing, specifying with particularity the matters and things in issue, if, upon consideration of the application, any pleadings or objections filed, or other matters which may be officially noticed, the Commission determines that:

(1) A substantial and material question of fact is presented (see also Section 1.2108);

(2) The Commission is unable for any reason to make the findings specified in paragraph (a) of this section and the application is acceptable for filing, complete, and in accordance with the Commission's rules, regulations, and other requirements; or

(3) The application is entitled to comparative consideration (under Sec. 24.431) with another application (or applications)

(f) The Commission may grant, deny or take other action with respect to an application designated for a formal hearing pursuant to paragraph (e) or Part I of this chapter.

(g) Reserved

(h) Reconsideration or review of any final action taken by the Commission will be in accordance with Subpart A of Part 1 of this chapter.

Sec. 24.433--24.438 [Reserved]

Sec. 24.439 Transfer of control or assignment of station authorization.

(a) Approval required. Authorizations shall be transferred or assigned to another party, voluntarily (for example, by contract) or involuntarily (for example, by death, bankruptcy, or legal disability), directly or indirectly or by transfer of control of any corporation holding such authorization, only upon application and approval by the Commission. A transfer of control or assignment of station authorization in the narrowband Personal Communications Service is also subject to Sections 24.309 (Designated Entities) and 1.2111 (Assignment or transfer of control: unjust enrichment)

(1) A change from less than 50% ownership to 50% or more ownership shall always be considered a transfer of control.

(2) In other situations a controlling interest shall be determined on a case-by-case basis

considering the distribution of ownership, and the relationships of the owners, including family relationships.

(b) Form required--(1) Assignment.

(i) FCC Form 490 shall be filed to assign a license or permit.

(ii) In the case of involuntary assignment, FCC Form 490 shall be filed within 30 days of the event causing the assignment.

(2) Transfer of control. (i) FCC Form 490 shall be submitted in order to transfer control of a corporation holding a license or permit.

(ii) In the case of involuntary transfer of control, FCC Form 490 shall be filed within 30 days of the event causing the transfer.

(3) Form 430. Whenever an application must be filed under paragraph (a) (1) or (2) of this section, the assignee or transferee shall file FCC Form 430 ("Common Carrier Radio License Qualification Report") unless an accurate report is on file with the Commission.

(4) Notification of completion. The Commission shall be notified by letter of the date of completion of the assignment or transfer of control.

(5) If the transfer of control of a license is approved, the new licensee is held to the original build-out requirement of Section 24.103.

(c) In acting upon applications for transfer of control or assignment, the Commission will not consider whether the public interest, convenience, and necessity might be served by the transfer or assignment of the authorization to a person other than the proposed transferee or assignee.

(d) [Reserved]

Sec. 24.440--24.442 [Reserved]

Sec. 24.443 Extension of time to complete construction.

(a) If construction is not completed within the time period set forth in Section 24.103, the authorization will automatically expire. Before the period for construction expires an application for an extension of time to complete construction (FCC Form 489) may be filed. See subsection (b) of this section. Within 30 days after the authorization expires an application for reinstatement may be filed on FCC Form 489.

(b) Extension of Time to Complete Construction--(1) General rule.

Application for extension of time to complete construction may be made on FCC Form 489. Extension of time requests must be filed prior to the expiration of the construction period. Extensions will be granted only if the licensee shows that the failure to complete construction is due to causes beyond his control.

(i) An application for modification of an authorization (under construction) does not extend the initial construction period. If additional time to construct is required, an FCC Form 489 must be submitted.

(d) [Reserved]

Sec. 24.444 Termination of authorization.

(a)(1) All authorizations shall terminate on the date specified on the authorization or on the date specified by these rules, unless a timely application for renewal has been filed.

(2) If no application for renewal has been made before the authorization's expiration date, a late application for renewal will only be considered if it is filed within 30 days of the expiration date and shows that the failure to file a timely application was due to causes beyond the applicant's control. During this 30 day period reinstatement applications must be filed on FCC Form 489. Service to subscribers need not be suspended while a late filed renewal application is pending, but such service shall be without prejudice to Commission action on the renewal application and any related sanctions. See also Section 24.16 (Criteria for Comparative Renewal Proceedings).

(b) Special Temporary Authority. A special temporary authorization shall automatically terminate upon failure to comply with the conditions in the authorization.

(c) [Reserved]

CONCURRING STATEMENT

OF

COMMISSIONER ANDREW C. BARRETT

RE: IMPLEMENTATION OF THE SECTION 309(j) OF THE COMMUNICATIONS ACT-- COMPETITIVE BIDDING NARROWBAND PERSONAL COMMUNICATIONS SERVICES IN THE 900 Mhz BAND.[THIRD REPORT AND ORDER]

This Third Report and Order adopts rules to conduct competitive bidding for narrowband Personal Communications Services [PCS]. Competitive bidding will be conducted to auction these narrowband PCS licenses for nationwide, regional, Major Trading Area, and Basic Trading Area markets. In our prior spectrum allocation Order for narrowband PCS [Memorandum Opinion and Order Gen Docket 90-314 (released March 4, 1994) (narrowband PCS Order)], the Commission allocated a total of 3,554 licenses in the following license areas for narrowband PCS: 11 nationwide licenses, 6 regional licenses in each of the 5 PCS narrowband regional markets, 11 Major Trading Area licenses [MTA] and 6 Basic Trading Area licenses [BTA]. The narrowband PCS Order also allowed any narrowband PCS licensee to aggregate up to three licenses in any geographic area. Incumbent paging licensees can aggregate two of the smaller allocations for narrowband PCS in the MTA and BTA markets.

Our Order today authorizes simultaneous, multiple round bidding for narrowband PCS licenses. The use of this auction methodology, in conjunction with our permissive rules for aggregation, will allow major market bidders to aggregate significant spectrum blocks for sophisticated, two-way advanced paging services. The process for bidding will be sophisticated, in order to permit market aggregation flexibility at the auction. I am hopeful that our efforts to conduct these auctions will be supplemented by educational seminars and concise instructions, to ensure that the public has a thorough understanding of this bidding process. I support these aspects of the Order.

The Order also adopts a 25% bidding credit and installment payments to facilitate participation in the narrowband PCS auction process by small businesses, and businesses owned by women and minorities [Designated Entities or DEs]. The Order declines to designate any of the PCS narrowband licenses for specific bidding by Designated Entities only. Instead, a bidding credit scheme is adopted which allows a bid on one of each type of license in a given market, except at the BTA level. I am concerned that we should have included more flexibility in the bidding credit structure in three ways: 1. Allow a band of bidding credit from 25-35% for major market licenses at the nationwide and regional level to enhance DE probability of participation in these auctions; 2. Allow more flexible consortia

configuration for larger market licenses, to allow DE participation that is non-controlling to qualify such a consortia for a 10-20% bidding credit, tied to the level of DE equity and operational ownership of 10-20% of the venture; and 3. Allow the 25% bidding credit for any DE bid that seeks to acquire 3 BTAs at the time of auction, in order to aggregate to a larger service area.

I believe these features would enhance the probability of DE participation in nationwide and regional licenses, in particular, and facilitate more flexible support for DE aggregation of BTAs. Without some blocks specifically set-aside for DE bidding only in each market, I remain concerned that our sincere efforts in this Order could still limit the ability to participate in major license markets--particularly nationwide or regional licenses. Thus, I would have sought additional flexibility with bidding credits and potential consortia arrangement for DEs to enhance their ability to participate in major market license operations. It is my hope that we will retain the flexibility to adjust these rules prior to conducting the narrowband PCS auctions, if it proves useful to our goal of facilitating real, substantive opportunities for DE participation in the bidding process and eventual operation of PCS licenses. For this reason, I concur in our action today.

*U.S. Government Printing Office: 1994 — 300-842/00021